

2 UNITED STATES BANKRUPTCY COURT
3 SOUTHERN DISTRICT OF NEW YORK

5 | In the Matters of:

7 RESIDENTIAL CAPITAL LLC, et al., Case No. 12-12020-mg

9 | Debtors.

11 JENKINS, et al., Case No. 12-01935-mg

12 | Plaintiffs,

13 - against -

14 | RESIDENTIAL FUNDING COMPANY, LLC, et al.,

15 Defendants.

For more information, contact the Office of the Vice President for Research and the Office of the Vice President for Student Affairs.

¹⁰ See, for example, the discussion of the 1992 Constitutional Convention in the *Constitutional Convention of 1992: The Final Report* (1993).

For more information, contact the Office of the Vice President for Research and the Office of the Vice President for Student Affairs.

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United States Bankruptcy Court
One Bowling Green
New York, New York

March 21, 2013

10:02 AM

B E F O R E:

HON. MARTIN GLENN

U.S. BANKRUPTCY JUDGE

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2 (CC: Doc# 2994) Debtors' Motion Pursuant to 11 U.S.C. 105(a)
3 and (d), Bankruptcy Rules 1015(c), 2002(m), 7016, and 9007 and
4 Local Bankruptcy Rule 2002-2 for Entry of an Order Approving
5 (A) Supplement to Case Management Order Establishing Mandatory
6 Procedures for Management of Adversary Proceedings Commenced by
7 Borrowers and Former Borrowers and (B) Related Relief.

8

9 (CC: Doc# 3116) Debtors' Application Under Bankruptcy Code
10 Sections 327(a), 328(a) and 363 for Entry of an Order Approving
11 Third Addendum to Engagement Agreement with FTI Consulting,
12 Inc., as Financial Advisor to the Debtors.

13

14 Doc# 3123 Debtors' Motion Pursuant to Section 105(a) of the
15 Bankruptcy Code and Bankruptcy Rules 1009, 3007 and 9019(b) for
16 Approval of (I) Claim Objection Procedures, (II) Borrower Claim
17 Procedures, (III) Settlement Procedures, and (IV) Schedule
18 Amendment Procedures.

19

20 (CC: Doc# 3055) Debtors' Motion Pursuant to Bankruptcy Rule
21 3013 and Bankruptcy Code Section 362(a) for a Determination
22 That (I) GMAC Mortgages FRB Foreclosure Review Obligation Is a
23 General Unsecured Claim and (II) The Automatic Stay Prevents
24 Enforcement of the FRB Foreclosure Review Obligation.

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2 (CC: Doc# 2274) Adj. Hearing RE: Motion for Relief from Stay
3 filed by Jeffrey L. Saltiel on behalf of Med&G Group, LP.

4

5 Adj. Hearing Re: Cure Objections. (Related Document no. 61)

6

7 (CC: Doc no. 1746) Status Conference RE: Limited Objection of
8 Financial Guaranty Insurance Company to the Debtors' Sale
9 Motion and Assumption Notice [Docket No. 1746]

10

11 Adversary Proceeding 12-01935-mg, Jenkins, et al. v.
12 Residential Funding Company, LLC, et al.: Doc# 10 Adj. Hearing
13 RE: Debtors Motion Pursuant to Fed. R. Bankr. P. 7012 and Fed.
14 R. Civ. P. 12(e) for a More Definitive Statement.

15

16 Adversary Proceeding 12-01935-mg, Jenkins, et al. v.
17 Residential Funding Company, LLC, et al.: (CC: Doc no. 1)
18 Adjourned Pre-trial Conference

19

20 Adversary Proceeding 12-02045-mg, Kimber, et al. v. GMAC
21 Mortgage Corporation et al.: (CC: Doc no. 1) Adjourned Pre-
22 trial Conference

23

24 Adversary Proceeding 12-02045-mg, Kimber, et al. v. GMAC
25 Mortgage Corporation, et al.: (CC: Doc# 13) Motion to Dismiss

1 Adversary Proceeding / Debtors' Motion for Dismissal of
2 Adversary Proceeding Pursuant to Bankruptcy Rule 7012(b) and
3 FRCP 12(b)(5) and (6) or, in the Alternative, Permissive
4 Abstention Pursuant to 28 U.S.C. 1334(c)(1)

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11 ALSO PRESENT:

12 SCOTT GOLDMAN, Residential Capital (TELEPHONICALLY)

13 SHARON B. JENKINS, Pro Se (TELEPHONICALLY)

14 FRANK REED, Defendant X

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1 P R O C E E D I N G S

2 THE COURT: Please be seated. We're here in
3 Residential Capital, number 12-12020. We also have several of
4 the adversary proceedings. Mr. Rosenbaum?

5 MR. ROSENBAUM: Good morning, Your Honor. Norm
6 Rosenbaum, Morrison & Foerster, for the debtors. Your Honor,
7 the first matter on is at page 8 of the agenda. It's IV.
8 These are the uncontested matters.

9 THE COURT: Go ahead.

10 MR. ROSENBAUM: Your Honor, the first matter on is the
11 debtors' motion to approve a supplement to the case management
12 procedures --

13 THE COURT: Right.

14 MR. ROSENBAUM: -- to apply to borrower adversary
15 proceedings. That's docket number 2994. Your Honor, no
16 objections have been received to the motion. These procedures
17 were developed closely in consultation between counsel for the
18 debtors, the committee and the special borrowers' committee,
19 SilvermanAcampora. If Your Honor has any questions, I'd be
20 happy --

21 THE COURT: I do.

22 MR. ROSENBAUM: -- to address them.

23 THE COURT: First, if there anybody else who wishes to
24 be heard with respect to this motion?

25 All right. In the paragraph dealing with the

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1 extension of answer or response deadlines, you need to make a
2 change. It reads now, "The following extensions will apply
3 notwithstanding any other date fixed by order of the Court."
4 That needs to be changed: "The following extensions will apply
5 except as otherwise ordered by the Court."

6 MR. ROSENBAUM: Thank you, Your Honor.

7 THE COURT: Anybody else have anything they want to
8 raise?

9 With that change, the motion is granted.

10 MR. ROSENBAUM: Thank you, Your Honor. The next
11 matter on is number 4 on page 9. And I'll cede the podium to
12 my partner, Mr. Marinuzzi.

13 MR. MARINUZZI: Good morning, Your Honor. For the
14 record, Lorenzo Marinuzzi on behalf of the debtors. Your
15 Honor, the next item on the agenda is the debtors' application
16 to amend the terms of FTI's retention.

17 As originally retained, Your Honor, FTI have this
18 concept of a monthly fee cap and a rollover provision, where to
19 the extent they incur time in excess of the monthly cap, but
20 there was some room going forward between the cap and what was
21 actually incurred, they could apply it. And realizing that
22 this case is taking longer than the parties anticipated it was
23 going to take when they originally agreed to these retention
24 terms, and in consultation with the committee, what we're doing
25 is just extending the rollover concept through the end of the

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1 year or through the confirmation of a plan.

2 Your Honor, we've modified the order, revised it in
3 accordance with the agreement between the debtors, FTI, and the
4 committee. I'm happy to send up to Your Honor a copy of the
5 marked order if you'd like to see it?

6 THE COURT: Sure, please. Thank you.

7 (Pause)

8 THE COURT: Okay, Mr. Marinuzzi.

9 MR. MARINUZZI: Your Honor, as Your Honor notes from
10 the modifications, we've built in also this concept that it
11 extends through December 31st, subject to further agreement
12 with the committee, in which case, no further order would be
13 required from Your Honor.

14 THE COURT: All right. Does anybody else wish to be
15 heard with respect to the FTI engagement? Mr. Eckstein?

16 MR. ECKSTEIN: Your Honor, good morning. Kenneth
17 Eckstein of Kramer Levin. The creditors' committee reviewed
18 this with the debtor and with FTI and is satisfied with the
19 proposed order.

20 THE COURT: Thank you. Anybody else want to be heard?

21 All right, it's approved.

22 MR. MARINUZZI: Thank you very much, Your Honor.

23 We'll submit an order.

24 Your Honor, I'm going to cede the podium again to my
25 partner, Mr. Rosenbaum.

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1 THE COURT: Thank you.

2 MR. ROSENBAUM: Your Honor, the next matter on is the
3 debtors' motion for approval of claims objection procedures,
4 borrower claim procedures, settlement procedures and schedule
5 amendment procedures.

6 Your Honor, again, this motion and proposed order was
7 developed in close cooperation with counsel for the committee
8 and special borrowers' counsel. No objections have been
9 received, Your Honor. If Your Honor has any questions, I'm
10 happy to address them. We did receive one request from AFI for
11 a reservation of rights to be basically carved out of the
12 order. That's the only change we made to the order that was
13 filed with the motion.

14 THE COURT: All right. Let me see if I had any
15 questions about this one. Anybody else wish to be heard with
16 respect to this motion?

17 All right, the motion's granted.

18 MR. ROSENBAUM: Thank you, Your Honor. Your Honor, I
19 think that moves us to the -- oh, Your Honor, I'm sorry. There
20 was one issue I did want to raise. Your Honor entered the
21 supplemental case management procedures. There are two matters
22 on. There's a status conference and a motion to dismiss on in
23 two of the adversary proceedings. That would obviate the need
24 to go forward.

25 THE COURT: I didn't view it that way. I thought

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1 about that. You had -- the two motions were in Jenkins and
2 Kimber.

3 MR. ROSENBAUM: Yes, Your Honor.

4 THE COURT: And my view is, we're going forward with
5 those.

6 MR. ROSENBAUM: We're prepared to do so, Your Honor.
7 Thank you.

8 THE COURT: We're going forward with those. In fact,
9 I'd like to do those now. I'd like to take them out of order
10 and deal with them now. I think they're here.

11 MR. ROSENBAUM: That's fine, Your Honor.

12 THE COURT: Okay. I don't need -- I've read all the
13 papers. That's why I don't want to put this off any longer.
14 I've been prepared for this several times before.

15 MR. ROSENBAUM: Your Honor, you want to take the
16 Jenkins matter first?

17 THE COURT: I do. I'd like to take --

18 MR. ROSENBAUM: I'm going to cede --

19 THE COURT: -- Jenkins and Kimber now.

20 MR. ROSENBAUM: That's fine, Your Honor. I'll cede
21 the podium to James --

22 THE COURT: Actually what I'd like to do is hear from
23 the defendants' counsel first. I may not have to hear from the
24 moving parties. All right. So is anybody going to argue in
25 opposition to the motion for a more definite statement in

1 Jenkins?

2 MR. NEWTON: Your Honor, I believe Ms. Jenkins is on
3 the phone.

4 THE COURT: Ms. Jenkins, are you on the phone?

5 MS. JENKINS: Yes, sir.

6 THE COURT: Would you like to be heard in opposition
7 to the motion?

8 MS. JENKINS: I'd like to make a statement to you,
9 Your Honor, that we have not secured the proper counseling yet.
10 Even though, you know, we are definitely in process of doing
11 that. And we appreciate the indulgence of the Court and the
12 other parties to allow us to continue to try to get the proper
13 lawyer. And so we're not really prepared to respond at this
14 time.

15 Your Honor, if I may say, we are senior citizens with
16 limited resources. And we only found out that there's serious
17 concerns regarding the processing of some corrected assignments
18 and all during a modification process. We would really
19 appreciate time to get the right lawyer.

20 THE COURT: Well, what I'm going to -- is there
21 anything else you'd like to add, Ms. Jenkins?

22 MS. JENKINS: Not right now, sir.

23 THE COURT: Okay. The debtors' motion is for a more
24 definite statement. The difficulty with the complaint is that
25 it really is not clear what relief you're seeking or why. I'm

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1 going to grant the debtors' motion for a more definite
2 statement and provide that you have sixty days in which to file
3 an amended complaint. That amount of time, Ms. Jenkins, will
4 give you time, if you're able to do so, to find counsel to go
5 ahead and file the amended complaint.

6 So it does not, on any final basis, dispose of the
7 matter. But the debtors' motion, which has been on file for
8 quite some time -- this matter has been adjourned before -- I
9 think pretty clearly lays out the difficulty, the problems,
10 with the complaint you filed.

11 So I'm going to go ahead and ask Mr. Newton if you
12 would prepare an order that grants the debtors' motion for a
13 more definite statement and provides that the plaintiffs shall
14 have sixty days in which to file an amended complaint. Set
15 this down for another status conference, another case
16 management conference. I don't know what the dates are, but in
17 advance of that sixty-day deadline.

18 And Ms. Jenkins, you can provide me with an update as
19 to whether you've been able to obtain counsel or not. So I'm
20 sympathetic to your argument. I mean, the case has been on
21 file for quite some time. And --

22 MS. JENKINS: Yes, sir.

23 THE COURT: -- I know it's very difficult to proceed
24 with a case such as this without counsel. So you'll have a
25 chance, still, to find counsel. You've got to -- somebody's

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1 got to fix the complaint, whether you have a lawyer or not.
2 Hopefully, if you're able to, you can get a lawyer who can do
3 that. So you'll still have that chance. But that's going to
4 be the Court's disposition of the motion in Jenkins.

5 Is there anything you need to add?

6 MR. NEWTON: No, Your Honor, thank you.

7 THE COURT: All right. Thank you. Ms. Jenkins,
8 you're excused, okay?

9 MS. JENKINS: Thank you so much.

10 THE COURT: All right.

11 MR. NEWTON: With that, Your Honor, I'll cede the
12 podium to my colleague, Erica Richards, for the Kimber matter.

13 THE COURT: Okay.

14 MS. RICHARDS: Good morning, Your Honor. For the
15 record Erica Richards of Morrison & Foerster appearing on
16 behalf of the debtors. At your request, we'll turn now to the
17 Kimber adversary proceeding. It's case number 12-02045.

18 THE COURT: And I guess I should have said -- let me
19 just back up for a second, because I didn't identify the
20 Jenkins case by case number. That's adversary -- Jenkins v.
21 Residential Funding Co., LLC, is adversary proceeding number
22 12-01935. I should have said that for the record.

23 So now go ahead with Kimber. Go ahead, Ms. Richards.

24 MS. RICHARDS: Your Honor, today Kimber is scheduled
25 as both a pre-trial conference and as a hearing on two motions

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1 to dismiss that were filed.

2 THE COURT: Let's go forward with the motions to
3 dismiss. And again, what I'd like to do is hear from the
4 defendant's counsel -- from the plaintiff's counsel first with
5 respect to any opposition to the motions to dismiss. Is anyone
6 appearing on behalf of Kimber in response to the two motions to
7 dismiss? Is there anybody on the phone in the Kimber case?

8 All right. The Court is going to take the Kimber
9 motions -- the two motions to dismiss under submission and
10 issue an appropriate ruling on them. Thank you very much.

11 MS. RICHARDS: Your Honor, I would just also note,
12 there was one count left of the complaint in the Kimbers'
13 Chapter 13 proceeding. The judge in that case has entered an
14 order dismissing that final count.

15 THE COURT: All right. Can you provide the Court with
16 a copy of the order?

17 MS. RICHARD: Absolutely.

18 THE COURT: Why don't you -- you can bring it up and
19 give it to one of my law clerks now. Okay? Thank you very
20 much.

21 All right, thank you very much.

22 MS. RICHARDS: Thank you, Your Honor.

23 THE COURT: All right, so we've taken care of Jenkins
24 and Kimber. What's next?

25 MR. RAINS: Good morning, Your Honor. Darryl Rains of

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1 Morrison & Foerster for the debtors. And I'm here to deal with
2 the 3013 motion by the debtors to classify the Federal
3 Reserve's consent order as a pre-petition unsecured claim.

4 THE COURT: Before we get to that, is there anything
5 else remaining on today's agenda other than the FRB motion? I
6 don't think so. Mr. Rosenbaum, is there anything else?

7 MR. ROSENBAUM: There are some cure matters, Your
8 Honor.

9 THE COURT: Those are really on just for status,
10 aren't they, or -- somebody help me out here. Well, there was
11 a partial resolution of --

12 MR. ROSENBAUM: I'm sorry, Your Honor. It's Norm
13 Rosenbaum --

14 THE COURT: -- MED&G --

15 MR. ROSENBAUM: Yes.

16 THE COURT: -- matters. Why don't -- let's deal with
17 that. I do --

18 MR. ROSENBAUM: Understood.

19 THE COURT: -- want to hear the argument on
20 classification of the Federal Reserve issue, but I want to
21 clear the rest of the stuff out of the way.

22 MR. ROSENBAUM: I believe counsel for MED&G is in the
23 courtroom.

24 THE COURT: Come on up. And I saw from the amended
25 agenda that you have a partial -- as I understand it, a partial

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1 resolution of the MED&G relief from stay motion and the
2 remainder then would carry. Is that right?

3 MR. ROSENBAUM: Yes, Your Honor.

4 THE COURT: Go ahead and make your appearance.

5 MR. BANEY: William Baney, Wenig Saltiel, for the
6 movant.

7 THE COURT: Okay. Somebody describe what --

8 MR. ROSENBAUM: Sure. The partial resolution is very
9 straightforward. In the underlying action, MED&G has cross-
10 claims against the debtors for basically equitable relief for
11 quiet title and for a declaratory judgment.

12 We're prepared to stipulate to allow those actions to
13 go forward, so that case can proceed. We're also a defendant
14 in that action, as the former servicer under the mortgage.
15 That will allow that portion of the case to go forward. We're
16 not prepared to stipulate today to allow the monetary damage
17 claims portion of that action to go forward against the
18 debtors.

19 THE COURT: As I understand from your objection to the
20 motion, no proof of claim was filed?

21 MR. ROSENBAUM: That's correct, Your Honor.

22 THE COURT: And no motion for a late-filed claim has
23 been -- unless maybe something's been filed and I haven't seen
24 it yet.

25 MR. ROSENBAUM: MED&G has recently, I think, earlier

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1 this week or late last week, filed a motion to file an untimely
2 proof of claim.

3 THE COURT: Okay. So that piece of it's --

4 MR. ROSENBAUM: We can submit a -- pursuant to our
5 stipulation, we can agree on a scheduling and put that off.

6 THE COURT: All right.

7 MR. ROSENBAUM: Hopefully we'll -- this potentially
8 may provide the opportunity to come to a resolution of this
9 matter.

10 THE COURT: All right. Counsel, do you want to --
11 anything you want to add?

12 MR. BANEY: No, Your Honor. That's --

13 THE COURT: Tell me your name again?

14 MR. BANEY: William Baney.

15 THE COURT: Thank you. Okay. All right. That's
16 satisfactory to me. So you'll submit a stipulation?

17 MR. ROSENBAUM: Yes, Your Honor.

18 THE COURT: Okay, thank you. Appreciate it. All
19 right.

20 MR. ROSENBAUM: Your Honor, I think the next matter is
21 the status conference on the FGIC cure objection. I'll cede
22 the podium to my partner Todd Goren.

23 THE COURT: I'm sorry, your voice trailed off.

24 MR. ROSENBAUM: Oh, I'm sorry.

25 THE COURT: FGIC?

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1 MR. ROSENBAUM: It's the status conference on the
2 pending FGIC cure objection.

3 THE COURT: Yes.

4 MR. ROSENBAUM: And I'm ceding the podium to Mr.
5 Goren.

6 THE COURT: Okay. Mr. Goren?

7 MR. GOREN: Thank you, Your Honor. Todd Goren,
8 Morrison & Foerster, on behalf of the debtors.

9 I believe we have a tentative resolution on a path
10 forward. There had been some letters exchanged and --

11 THE COURT: Yes, I know. I saw the letters.

12 MR. GOREN: And the primary dispute was FGIC wants to
13 sort of keep everything together. The debtors had an issue
14 with that because FGIC's asserting 281 million on cure on deals
15 that Ocwen's saying we can't assume and assign to them. So we
16 had a bit of a chicken and egg problem.

17 The fix we came up with that, is FGIC has agreed to
18 cap their cure claim at the purchase price on the MSRs for
19 those term-to-term deals, so that that will allow us to go
20 forward with everything all at once and push off any cure
21 hearing with respect to those deals until we can figure out
22 whether or if they're being assumed and assigned.

23 So I think with that resolution, we were looking for
24 potentially a late May hearing date. We could set it up for
25 the May 30th omnibus or --

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1 THE COURT: No, I don't think so. May 28th is the
2 start of the 9019 trial.

3 MR. GOREN: Right.

4 THE COURT: So it isn't going to happen then.

5 MR. GOREN: Okay. That makes sense. So --

6 THE COURT: I mean, you'll get a date soon. I'm not
7 trying to put you off, but --

8 MR. GOREN: No, no, that --

9 THE COURT: -- we've got a trial scheduled.

10 MR. GOREN: Okay. So --

11 THE COURT: I'd be very happy, if that date opens up
12 that -- go ahead, Mr. Goren.

13 MR. GOREN: So should we just speak with chambers
14 about a date?

15 THE COURT: Yes, please do.

16 MR. GOREN: Okay.

17 THE COURT: But let me -- counsel, why don't you come
18 on up and identify yourselves for the record.

19 MR. WYNNE: Good morning, Your Honor. Richard Wynne
20 of Jones Day on behalf of FGIC.

21 THE COURT: Good morning. Anybody else?

22 MS. DEMARCO: Good morning. Jennifer DeMarco from
23 Clifford Chance, for Ocwen.

24 THE COURT: Okay. So I don't want to get into a back-
25 and-forth about it. I've read the letters. I guess the

1 distressing thing to me is at least what FGIC seems to believe
2 is the unresponsiveness of Ocwen in trying to get these issues
3 resolved. Is there a process underway to do that? Because
4 otherwise I will enter an order requiring face-to-face meetings
5 and a path forward.

6 The one thing I won't abide is ignoring the issues,
7 not responding, not negotiating, not trying to resolve it,
8 putting it off month by month by month. So either you all work
9 out this process going forward, the path forward, with specific
10 dates when you'll exchange position statements, when you'll
11 meet, when you'll try and resolve it, but otherwise I'm going
12 to -- if you can't agree on that, I'm going to enter an order.

13 MS. DEMARCO: Your Honor, we didn't respond to FGIC's
14 letter. At the time --

15 THE COURT: I don't know you didn't.

16 MS. DEMARCO: -- it was scheduled. We don't agree
17 with its content --

18 THE COURT: And you probably have a different point of
19 view.

20 MS. DEMARCO: -- we don't agree with it at all.

21 I do believe we have a process in terms of negotiating
22 going forward. This is not about adequate assurance. This is
23 about FGIC's request for amendments to its contracts.

24 THE COURT: And the only way that's going to happen is
25 if you're meeting and exchanging positions and actually

1 negotiating it.

2 MS. DEMARCO: They made a proposal yesterday.

3 THE COURT: Okay.

4 MS. DEMARCO: And there is a process by which we
5 are -- or at least a timeline by which we'll either agree or we
6 won't agree.

7 THE COURT: What's the timeline?

8 MS. DEMARCO: Four weeks.

9 THE COURT: Okay. Is that satisfactory?

10 MR. WYNNE: Yes, Your Honor. We actually did have a
11 very productive meeting yesterday.

12 THE COURT: Okay.

13 MR. WYNNE: And I think that we're on, I think, the
14 right path. And, Your Honor, if we get off the path, I think
15 we've talked about a scheduling order that will have certain
16 dates --

17 THE COURT: Okay.

18 MR. WYNNE: -- and I think we'll be fine.

19 THE COURT: That's fine. Thank you very much.

20 MR. WYNNE: Thank you, Your Honor.

21 THE COURT: Okay. Mr. Goren, anything else on this?

22 MR. GOREN: That's it, Your Honor. Thank you.

23 THE COURT: Thank you, Mr. Goren. Mr. Rains,
24 everything else is cleared away now? Okay.

25 MR. RAINS: Good morning, Your Honor. Once again,

1 Darryl Rains of Morrison & Foerster, here to address the
2 classification motion under Rule 3013.

3 Before I begin with my remarks, I wanted to address
4 the issue of whether this should be an evidentiary hearing or
5 not. And I'm happy to report that the creditors' committee and
6 Ally and the debtors have discussed this, and we have concluded
7 that if I can read three stipulated facts into the record,
8 there is no other need to offer additional evidence at the
9 hearing today.

10 As the Court knows, some exhibits have been offered.
11 Those came in without objection. There are declarations from
12 our side from Mr. Marano and from Ally from Mr. Mackey. And
13 the parties have agreed, we don't need to cross-examine those
14 witnesses unless the Court needs to have them testify.

15 THE COURT: I don't.

16 MR. RAINS: So with the Court's permission, I would
17 like to just read three stipulated facts that have been agreed
18 to between Ally and the debtors, which will allow us to avoid
19 live testimony.

20 One: With consent order compliance, the debtors
21 generated substantial value to the estates. Two: Ally is
22 secondarily liable for the costs of the foreclosure review as
23 set out in the consent order and the supplemental agreement
24 between Ally and the Federal Reserve. Third: Ally is jointly
25 liable to PricewaterhouseCoopers for the costs of the

1 foreclosure file review under the terms of the Pricewaterhouse
2 engagement letter.

3 With that, Your Honor, I'd like to begin with one
4 simple idea. The law does not and should not require the
5 debtors to waste 300 million dollars. I say 300 million
6 dollars, because that is the projected cost from today going
7 forward of paying PricewaterhouseCoopers to do its foreclosure
8 file review. And I use the word "waste", because all parties,
9 from Ben Bernanke on down have concluded that the foreclosure
10 file review process is a waste. It was a mistake from the
11 beginning. It is a waste of money. It is a foolish process.

12 I appreciate that we're in a court of equity. I
13 submit that it is -- well, wasting 300 million dollars is
14 neither fair nor equitable to the debtors' estate nor to the
15 creditors of the estate, and most importantly, it is not fair
16 or equitable to the borrowers, on whose behalf the consent
17 order was entered into and who are still waiting for payment.

18 As the Court knows, until now, the debtors have been
19 of the view that the foreclosure file review was properly
20 treated as an administrative expense. It was an actual and
21 necessary cost of preserving the estate. We felt that
22 compliance with the regulators' dictates was and is necessary.
23 And the debtors saw no alternative but to proceed with the
24 foreclosure file review. And this Court agreed with us.

25 But several new developments have made it clear to the

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1 debtors that the foreclosure file review is no longer
2 necessary. It is not the only alternative available. It is
3 not necessary for the preservation of the estates' assets.
4 Indeed, quite the opposite. We've reached the conclusion that
5 the foreclosure file review is unnecessary and that it is
6 depleting the estates' assets.

7 THE COURT: If the foreclosure file review is
8 completed, what is the resulting work product supposed to show?

9 MR. RAINS: The foreclosure file review, if you look
10 at paragraph 3 and 4 of the consent order, it requires the
11 preparation of a report by PricewaterhouseCoopers. And the
12 report really only has to say two things for each borrower:
13 were they injured and by how much.

14 And so you can think of the foreclosure file review as
15 a preparatory step to the debtors' ultimate obligation to make
16 a restitution or remediation payment to injured borrowers. It
17 is a --

18 THE COURT: So absent the consent order requiring the
19 foreclosure review, there is no other process in place to
20 identify borrowers who have been harmed and in what amounts.
21 Is that correct?

22 MR. RAINS: That is correct, Your Honor. Let me say
23 two things. The consent order and the power that the Federal
24 Reserve has under 1818 is to order remediation or
25 reimbursement. In this particular consent order, it is a two-

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1 step process. The second step is pay reimbursement. The first
2 step was hire PricewaterhouseCoopers to find out who was
3 injured and by what amount.

4 The alternative that is now available to us skips
5 that --

6 THE COURT: Well, it's not available to you, because
7 you haven't negotiated an amendment to the consent order with
8 the Federal Reserve Board.

9 MR. RAINS: I understand that that's the Federal
10 Reserve's point. But I want to speak to you in a moment about
11 Chateaugay, because I think it doesn't require that amendment.
12 But the Court is correct that under the consent order, it's a
13 two-step process. The alternative that has been made available
14 to everyone else turns it into a one-step process which is
15 faster, cheaper and easier, but as the Court recognizes, is
16 over-inclusive. The new process provides money to everyone who
17 was foreclosed upon by a servicer, whether or not they can
18 demonstrate any injury.

19 Let me take up the Court's point whether it has to be
20 in a consent order. I think first that it is -- the Court
21 needs to recognize that this is not just an amendment that has
22 been achieved by thirteen other servicers. What we really have
23 here is a change of policy or a change in position by the
24 Federal Reserve, that does apply to everyone.

25 We know that the Federal Reserve has already entered

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1 into settlements or amended consent orders with thirteen other
2 servicers. The Court needs to appreciate that that same
3 proposal has been made to the debtors. I'm not going to speak
4 to any of the terms or the amounts. But it is clear that the
5 Federal Reserve -- it's now in public -- that the Federal
6 Reserve has made a cash payment option available to the debtors
7 in lieu of foreclosure file review. So that option has been
8 made available to us, and it's clear that it is an option that
9 is available to the Federal Reserve.

10 I also wanted to highlight for the Court some of the
11 comments made by Chairman Bernanke three weeks ago before the
12 House Financial Services Committee, where he was asked tough
13 questions about why the Federal Reserve has required servicers
14 to spend over one and a half billion dollars on consultants
15 without any money going out to borrowers.

16 What Mr. Bernanke said -- and it's responsive to the
17 Court's question -- he said, "We've changed our process to a
18 much quicker, more streamlined process, which is going to cut
19 out the consultants and will have checks going out to borrowers
20 very, very quickly, within weeks." He went on to say that,
21 under the new cash payment program, "all of which will be
22 reflected either in cash payments or in mortgage relief to
23 borrowers, none going to consultants."

24 Our conclusion from these facts is that the
25 foreclosure file review program has been ended. It is being

1 replaced by a better alternative, lump sum restitution
2 payments; that the Fed wants to stop wasting money on
3 consultants and wants to get relief out to borrowers. We think
4 that recognition is enough under Chateaugay to allow the Court
5 to conclude that our obligation is one for a cash payment which
6 can be classified as a pre-petition --

7 THE COURT: How much is that cash payment?

8 MR. RAINS: What I can tell you is we have offered --

9 THE COURT: The Fed has cut a deal with others
10 quantifying the amount, but you don't have a deal with the Fed.
11 You don't have a signed agreement -- you may have discussions
12 with the Fed, but you don't have a signed agreement with the
13 Fed as to how much could be paid to avoid the consent.

14 MR. RAINS: That is correct. We don't have a signed
15 agreement. We do have a proposal from them.

16 THE COURT: I understand you have a proposal.

17 MR. RAINS: But let me be more clear. We have made a
18 counterproposal to them which I believe is in the same amount.
19 The difference between us is not the amount of the claim; it is
20 whether it is an administrative cash payment or it is an
21 unsecured claim. That's really the difference, not the amount
22 that we would --

23 THE COURT: Well --

24 MR. RAINS: -- be agreeing to.

25 THE COURT: -- you don't have an agreement with the

1 Fed --

2 MR. RAINS: That is correct.

3 THE COURT: -- to amend the consent order.

4 MR. RAINS: That's absolutely correct.

5 THE COURT: So the only -- absent an amendment of a
6 consent order there is no other obligation that would quantify
7 how much would be paid and how it would be treated in terms of
8 priority.

9 MR. RAINS: So again, I don't think the number will be
10 in dispute, but I believe the Court has plenty of powers to
11 help us decide what the amount would be. The Court could
12 estimate it if nothing else happens. But what we've seen -- I
13 read this in the OldCo M Corp case that you decided -- there
14 are -- even future contingent claims, you can come to an
15 agreement or a resolution of what the amount should be. And I
16 think we could do that here. I don't think that's the
17 obstacle. The obstacle is whether it's cash or a claim.

18 Now, let me address the Court's very specific point.
19 The Fed argues that the option to make a cash payment's not in
20 the consent order. That's clearly true. But I believe that's
21 a misreading of Chateaugay. In the Second Circuit decision,
22 what the court said was, if you are trying to remedy a past
23 problem like an environmental spill or something else, but it
24 is clear that what you're trying to do does not affect ongoing
25 behavior, and if the regulator had the statutory authority to

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1 seek as an alternative a cash payment, that is enough.

2 Let me read the key sentence from Chateaugay to you,
3 because I think it sets out this exact issue. It's from page
4 1008 of the Second Circuit's decision. "In order to clean up a
5 site, to the extent that it imposes obligations distinct from
6 any obligation to stop or ameliorate ongoing pollution, is a
7 claim if the creditor obtaining the order had the option, as
8 CERCLA confers, to do the cleanup work itself and sue for
9 response costs."

10 The issue here is not whether the opportunity arises
11 under the consent order. It's whether the creditor, in this
12 case the Fed, had the option under its statute, to seek a cash
13 payment as a remedy. That's what Chateaugay says. And 1818(b)
14 gives the Fed that exact power.

15 THE COURT: Where in the statute is that?

16 MR. RAINS: 1818(b). That's Article 12, 1818(b).
17 It's the cease and desist order power that belongs to the
18 Federal Reserve, has a provision in it that gives them specific
19 power to order reimbursement or remediation payment. It is, in
20 fact, the power by which the Federal Reserve ordered us to
21 provide remediation to our customers. And it is the same
22 provision that allowed them to make the amendments providing
23 for cash payments that the thirteen other providers have
24 already done. So I don't think there's any dispute under
25 1818(b) that the Fed's power to order restitution allows them

1 to order a cash payment.

2 THE COURT: Absent an agreement between the Fed and
3 the debtors, could the Fed order the debtors to make payments
4 to every homeowner whose home was foreclosed, whether it was a
5 proper or improper foreclosure? I mean, if the Fed ordered you
6 to make payments to a borrower whose home was foreclosed, and
7 it was all done absolutely correctly, you'd be up here opposing
8 it and say they have no authority to order that we just pay
9 money to people. Would you agree with that?

10 MR. RAINS: Well, I think what would happen -- and
11 forgive me for not being an expert on cease and desist
12 proceedings -- but I think what happens under 1818 is there is
13 a thirty- or sixty-day process by which the Fed can order cease
14 and desist proceedings.

15 Now what happens in practice is when your primary
16 regulator asks you to change something, they always end up in
17 consent orders. I'm not aware of -- in fact, someone told me
18 yesterday, no one had a Fed -- a contested Fed cease and desist
19 order proceeding last year.

20 But what would, in fact, happen under their process is
21 there would be contested cease and desist proceeding.

22 THE COURT: But they didn't -- I mean, what they
23 did -- the consent order, phase I, which turned out to be
24 incredibly expensive, is identify whose home was improperly
25 foreclosed and they'd been injured and how much do we pay

1 them -- how much do you have to pay them restitution.

2 The problem with that is, is that it's costing you 350
3 million dollars to figure out who you ought to -- might pay 50
4 million dollars to. That makes no sense. Okay. But if
5 they -- it may be that you could settle the matter by saying
6 look, this makes no sense, we'll just pay everybody. It
7 doesn't -- whether they demonstrate injury or not, we'll just
8 pay everybody, because economically that makes much more sense
9 than what's been agreed upon.

10 So it's one thing when you settle with a regulator or
11 private parties and what the structure of the settlement is.
12 The issue is, can they simply order you -- you just find
13 everybody who ever had a loan that was serviced by or
14 originated by any of the debtors; write them a check, whether
15 you did anything wrong or not.

16 MR. RAINS: Again, I'm not an expert on how those
17 cease-and-desist proceedings go. I don't know what position we
18 would take --

19 THE COURT: Do you have somebody on your team who can
20 answer my question?

21 MR. RAINS: Anyone want to tackle what would happen if
22 they tried --

23 THE COURT: I think I know the answer to that.

24 MR. RAINS: Well, the practical answer is the one I
25 gave, which is when the regulator --

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1 THE COURT: Well, the practical answer is that --

2 MR. RAINS: -- you sit down and you work it out.

3 THE COURT: Yes. That's the practical answer.

4 MR. RAINS: There is someone here. My partner Oliver
5 Ireland, who is our former Fed guy and the guy who's handled
6 the discussions with the Fed is the right guy to answer --

7 THE COURT: I don't want to know about the discussions
8 with the Fed, because that's in the nature of settlement. Go
9 ahead.

10 MR. IRELAND: And your question --

11 THE COURT: Good morning.

12 MR. IRELAND: -- could you repeat the question?

13 THE COURT: Well, my question is, could the Fed simply
14 order you to pay everybody whose loan was foreclosed where you
15 originally originated it or any type -- ever serviced the loan,
16 that you pay them money whether there was anything wrong --
17 incorrectly?

18 MR. IRELAND: The Fed has --

19 THE COURT: These aren't just -- just make payments to
20 everybody because it's cheaper.

21 MR. IRELAND: The Fed has a procedure available to
22 them under Section 1818 whereby they can begin an
23 administrative proceeding to find practices unsafe, unsound or
24 not in accordance with law, and order remediation based on
25 those findings.

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1 If you went to an administrative trial, went through a
2 process of the administrative law judge recommending to the
3 Board a resolution of the Fed's complaint against the financial
4 institution, and the Board so ordered, the financial
5 institution could seek judicial review. And there's a judicial
6 review process --

7 THE COURT: In the D.C. Circuit?

8 MR. IRELAND: -- in the statute for them to do that.

9 THE COURT: Would that go to the D.C. Circuit?

10 MR. IRELAND: I'd have to go back and look. I used to
11 advise the Board in my former role after the administrative law
12 judge proceedings had concluded as to how to proceed in orders
13 typically --

14 THE COURT: But restitution --

15 MR. IRELAND: Restitution and reimbursement are
16 express options in the statute.

17 THE COURT: But don't they require that something had
18 been done incorrectly, that someone had suffered --

19 MR. IRELAND: Well, there --

20 THE COURT: -- injury?

21 MR. IRELAND: -- there is a separate power that
22 addresses illegal acts. So you can bring an enforcement order
23 to deal with acts that are not in accordance with law. There
24 is also a power to do thing -- to order reimbursement and
25 restitution. The Federal Reserve also has the power under

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1 Section 5 of the Federal Trade Commission Act to find certain
2 acts to be unfair or deceptive even though they are in
3 accordance with other laws such as procedural laws --

4 THE COURT: I'm familiar with Section 5 of the --

5 MR. IRELAND: So they could find, even though you
6 thought the mortgage foreclosure process was done properly,
7 that it was done unfairly --

8 THE COURT: But let's assume it was done --

9 MR. IRELAND: -- and order restitution.

10 THE COURT: -- entirely fairly, that they did it
11 exactly right?

12 MR. IRELAND: Can they order --

13 THE COURT: The borrower agrees, yes my home was
14 foreclosed, but they made all the disclosures they were
15 required to make, the process was done according to state law
16 procedures, everything was done correctly, but we'd be happy to
17 take their money?

18 MR. IRELAND: Well, I think what the Fed is trying to
19 do with the settlement orders with the other servicers and
20 their proposals to ResCap and Ally is to identify what they --
21 as best they can, the group that may have been subject to
22 unfair practices and to provide remediation for that. Because
23 we have not gone through the file review procedure, that
24 process is necessarily imprecise.

25 In my experience in other Fed supervisory actions,

1 typically the process is imprecise, because you don't know
2 exactly -- you haven't had a trial to determine exact damages
3 in every single one of them. But as a matter of administrative
4 practicality, this is the most efficient way to address the
5 issue.

6 THE COURT: All right. I think I understand the
7 issue. Mr. Rains, do you want continue? I don't -- unless
8 there's anything else you want to add?

9 MR. IRELAND: No.

10 MR. RAINS: Just briefly, Your Honor.

11 THE COURT: Go ahead, Mr. Rains.

12 MR. RAINS: Judge, I don't want to belabor what we've
13 been covering. I appreciate the Court's point that under 1818
14 the Federal Reserve, if they were to litigate it, would have to
15 show some improper conduct by the debtors. And whether they
16 would have to show causation and the degree of precision with
17 which they'd have to do that is maybe unsettled.

18 It is certainly the case, though, that the Fed's new
19 program, which we think is the one the Court should follow,
20 does involve reimbursing our customers who were foreclosed upon
21 or at least had foreclosure proceedings started against them
22 during the specified period. And the program compensates those
23 people for their injury, and would compensate other people
24 without any need to show injury, although they are still in the
25 group of potentially affected people.

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1 To us, getting caught up on the process of trying to
2 identify with precision the precise persons who should benefit
3 and the amount of money they should get, really should be
4 thought of as a preparatory step. It is --

5 THE COURT: Yes, but you know, let me just -- the
6 committee's reply did an effective job of arguing that
7 restitution payments would be a pre-petition unsecured claim.
8 Where the argument struggles is -- so with that, let's say
9 fifty million dollars, just hypothetically --

10 MR. RAINS: Yes, our estimate is forty to eighty-five;
11 fifty or sixty is a nice round number.

12 THE COURT: So assume fifty million dollars. That
13 that -- the committee, I think, makes a strong argument that
14 that would be a pre-petition unsecured claim, unless
15 somebody -- unless there was some post-petition foreclosure or
16 something. But let's put that aside.

17 The struggle is what you do with the cost of the
18 foreclosure review. The lynchpin to your argument has been,
19 well the Fed has cut different deals with thirteen other
20 servicers to convert what is otherwise an absolutely wasteful
21 structure that results in the consultant being compensated
22 extremely well while homeowners get a fraction. Okay?

23 Since I'm not even sure whether I would need to decide
24 at this point whether the restitution payments are -- would be
25 unsecured claims or not, because you're not proposing to pay

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1 any of them right now -- I suppose at some point I'd have to
2 decide that -- the real thing you're trying to get out from
3 under is the independent foreclosure review which has this
4 monumental price tag. And that's where I'm having more
5 problem.

6 MR. RAINS: I guess I have a couple of responses. I
7 appreciate the issue. A couple of responses.

8 First, if our proposal is multiples of fifty million,
9 so that we can be sure that whoever was within the proper
10 restitution pre-petition claim that you've identified gets a
11 claim -- gets a claim larger than they would be entitled to as
12 a pre-petition claim, to me, that ought to be enough to allow
13 the Court to proceed to classify that restitution claim at a
14 multiple as a pre-petition claim.

15 But the more important issue for me, Your Honor, the
16 Fed acts as though, and your comments suggest, that the
17 obligation to do a pre-petition -- or excuse me, to do a
18 foreclosure file review is somehow some independent forward-
19 looking injunctive act that has some purpose to it.

20 THE COURT: Well, look --

21 MR. RAINS: It's not.

22 THE COURT: -- let's assume you weren't in bankruptcy.
23 Let's assume you signed this consent and then you realized this
24 price tag is nuts, so you sell the business. But the buyer
25 doesn't assume the obligation to do the independent foreclosure

1 review. Do you think you get out from under a consent decree
2 you've signed with the Fed to do this independent foreclosure
3 review the result of which is going to be to identify all of
4 the borrowers on your watch who've been harmed and should
5 receive restitution or reimbursement?

6 I mean, to the extent that you argue changed
7 circumstances, we're no longer in this business -- I agree
8 you're no longer in this business -- but you signed a consent
9 decree that had two steps to it: one, do the independent
10 foreclosure review, two, pay restitution to those who are
11 identified, okay, is it really so easy to get out from a
12 consent order with the Fed that requires you to do a complete
13 review by saying, oh, we're no longer in the business? The
14 fact that nobody will go through and identify who was harmed,
15 how much they were harmed, too bad.

16 MR. RAINS: I come back to Chateaugay, Your Honor,
17 because I don't think what we're saying is we want to change
18 the consent order or that we want to amend it.

19 THE COURT: Well, you do --

20 MR. RAINS: What I under --

21 THE COURT: -- because you want to stop. The consent
22 order requires you to do an independent foreclosure review, and
23 you want to stop doing the independent foreclosure review.

24 MR. RAINS: What I think Chateaugay teaches is the Fed
25 has -- in fact has always had -- a statutory authority to just

1 order a cash payment under 1818(b).

2 THE COURT: If they could identify who was entitled to
3 a cash payment, they could order it. But you'd be standing --
4 if they said pay 200 million dollars total to every borrower
5 even though ten percent of them were the only ones who could
6 establish that there was anything improper, you'd be standing
7 up here arguing they can't do that. They can't require us to
8 pay 300 million dollars when, in fact, at most the harm or
9 losses are 50 million.

10 MR. RAINS: But in fact, Your Honor, we are here
11 saying we are prepared to agree to a multiple of the estimated
12 harm.

13 THE COURT: So go off and negotiate with the Fed; come
14 to an agreement and then come back to me.

15 MR. RAINS: Right.

16 THE COURT: I don't know. I'm not -- I don't mean
17 to -- I've got a lot of trouble with everybody's arguments in
18 this. It's a very difficult issue in my view.

19 MR. RAINS: Right. I'll reserve my other comments --

20 THE COURT: Okay. Thank you, Mr. Rains.

21 MR. RAINS: -- about the automatic stay and all of
22 that. I think all of those fall away if the Court decides.

23 THE COURT: Okay. All right.

24 MR. RAINS: Let me end with, if I could, Your Honor,
25 with one small other suggestion. If the Court's not inclined

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1 to grant our order today --

2 THE COURT: I'm not ruling today. I'll tell you --

3 I'm making that crystal clear.

4 MR. RAINS: Okay. We have offered and we'll offer
5 again today --

6 THE COURT: Look, don't offer to me, offer to the Fed.
7 If you work out a deal with the Fed --

8 MR. RAINS: What I was going to say --

9 THE COURT: -- come back to me and tell me.

10 MR. RAINS: What I was going to say is not a
11 settlement. What we would like to propose is a three-day -- a
12 three-week holiday. We would like the Pricewaterhouse people
13 to take a well-earned three-week vacation and we will take the
14 money we would've spent to them, and put it in an escrow
15 account while we try to work this out with the Fed. And
16 however the Court ends up ruling on this whether it goes to --

17 THE COURT: Well, you've offered that to the Fed and
18 what'd they tell you?

19 MR. RAINS: They want us to keep spending money.

20 THE COURT: All right. Let me hear from the
21 committee.

22 MR. RAINS: Thank you, Your Honor.

23 THE COURT: Thank you.

24 MR. O'NEILL: Your Honor, Brad O'Neill, on behalf of
25 the committee. I'd like to pick up where you just were on the

1 issue of restitution, because I think Your Honor correctly read
2 our brief, and we perceive the IFR process --

3 THE COURT: Well, you made a good argument for the
4 restitution payments being general unsecured claims, but where
5 I wasn't -- and I'm not saying I'm persuaded yet with it -- but
6 where I had much more problem was about the cost to the IFR.

7 MR. O'NEILL: Well, there are a couple of responses I
8 think, Your Honor. First, I think it's artificial to divorce
9 the two. Clearly the IFR was directed and participated in
10 all -- its part and parcel to an order of restitution. So to
11 say one is an administrative expense and the other is a general
12 unsecured claim, frankly, doesn't make a heck of a lot of
13 sense. Two, the Fed has the ability to regulate conduct, to
14 address regulated conduct. It doesn't have the power in a
15 bankruptcy case to adjust private rights. And this process is
16 primarily, in fact, entirely directed at adjusting private
17 rights, in particular the rights of pre-petition borrowers
18 against the debtors.

19 THE COURT: No, the process is designed to identify
20 borrowers who in the Fed's view are entitled to relief -- to
21 payment.

22 MR. O'NEILL: To adjudicate what are essentially
23 pre-petition claims against the debtor. To say yes, there's a
24 claim arising out of pre-petition misconduct and to pay it.

25 THE COURT: As you stand there today, you can't tell

1 me who is entitled to a payment or not. The solution -- and it
2 may make perfect sense is just pay everybody because in a
3 sense, it's rough justice. Okay. People who weren't entitled
4 to payments will be getting payments but the total cost to the
5 debtors will be substantially less. From a rough justice
6 standpoint it makes absolute sense.

7 MR. O'NEILL: As an economic matter, Your Honor, that
8 may be the answer. But here the Fed clearly is not regulating
9 the conduct of the debtor because we don't have a business
10 anymore. And, frankly, when they wanted to regulate the
11 conduct of the debtors' business, they did so directly. They
12 required us to implement new servicing standards. They
13 required assorted other internal business modifications. This,
14 however, is simply just restitutions. That's all it is.

15 THE COURT: So let me ask you this. Assuming there
16 was no agreement by which Ally was secondarily liable for the
17 independent foreclosure review. Let's assume that agreement
18 didn't exist. You'd be standing here, you'd be making the same
19 argument and the result would be nobody would pay for the IFC.
20 The IFC would stop because nobody -- your view is facts have
21 changed; it's a pre-petition claim; there isn't any money to
22 pay for it. So Pricewaterhouse will stop work. The counsel
23 will stop work because nobody's going to pay them. That's your
24 position?

25 MR. O'NEILL: Well, obviously, that's a hypothetical

1 scenario.

2 THE COURT: Well --

3 MR. O'NEILL: AFI is on the hook.

4 THE COURT: Just -- but answer my hypothetical.

5 MR. O'NEILL: Okay. What your positing -- yeah. The
6 answer is we would advocate awarding PwC an unsecured claim for
7 the value of its services.

8 THE COURT: Oh, I'm sure they would be very happy to
9 continue working.

10 MR. O'NEILL: And I think it would be very unlikely,
11 Your Honor, that the Fed would prosecute officials of the
12 debtors here for not pursuing a policy which the Fed itself has
13 turned its back on. And it seems to us, Your Honor, artificial
14 and irrational for the Fed to continue insisting that the
15 debtors perform under this expensive and misdirected program
16 when --

17 THE COURT: That I agree with.

18 MR. O'NEILL: -- when the Fed itself has acknowledged
19 it's not the Fed's policy anymore.

20 THE COURT: That part I agree with.

21 MR. O'NEILL: It's not the Fed's regulatory goal or
22 purpose to pursue this.

23 So the notion that they're going to turn around and
24 penalize officers of the debtor for not doing it seems to us to
25 be wildly farfetched.

1 THE COURT: Except that they agreed in an order that
2 appears to be enforceable under statute to do exactly that, an
3 order which -- I mean, in addressing the jurisdictional
4 argument which the Fed didn't really press but Ally did, your
5 argument in response was nobody's talking about modifying the
6 consent order. But if there isn't anybody to pay for it, there
7 is no independent foreclosure review. Do you agree with that?

8 MR. O'NEILL: Could you repeat that? I'm sorry.

9 THE COURT: You can't comply with the consent
10 requirement of the independent foreclosure review if there's
11 nobody to pay for it. So if you take my hypothetical, and if
12 Ally wasn't secondarily liable, it's another hypothetical case.

13 MR. O'NEILL: In your hypothetical, yes, we could not
14 comply with the order. However, your hypothetical is counter
15 factual.

16 THE COURT: And that's the statute -- the Fed's
17 statute. Actually it says no court can modify their order. Do
18 you agree with that?

19 MR. O'NEILL: The statute says Your Honor cannot amend
20 their order, yes.

21 THE COURT: And you agree with that?

22 MR. O'NEILL: Yes.

23 THE COURT: Okay.

24 MR. O'NEILL: However, fortunately that's not the
25 state of facts we have here --

1 THE COURT: You want Ally to pay?

2 MR. O'NEILL: -- and the order is silent as to who has
3 to pay. In fact --

4 THE COURT: Well, it's not silent.

5 MR. O'NEILL: It says the debtor will retain --

6 THE COURT: It makes the debtors primarily liable and
7 Ally secondarily liable.

8 MR. O'NEILL: Secondarily liable, and then in the
9 engagement letter they're jointly and severally liable.

10 THE COURT: Well, let me ask you this because -- and
11 I'm changing the issue. You made -- and I do want to hear the
12 Fed and Ally on this, but in your reply you made a strong
13 argument that the restitution -- any restitution payments would
14 be pre-petition unsecured claims. In the consent order, in
15 paragraph 3(d), it requires -- I'm not going to read the
16 language. I'll wait for everybody to get there. It's on page
17 14. It has a defined term, "mortgage servicing companies".
18 Ally is included within the definition of mortgage servicing
19 companies.

20 So what happens if the Court were to determine that
21 the restitution payments are pre-petition unsecured claims such
22 that they would be paid pro rata with other unsecured
23 creditors? Would Ally be liable for the shortfall of
24 restitution payments under paragraph 3(d)?

25 MR. O'NEILL: Under the scenario you posit, yes.

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1 THE COURT: And I'm sure Ally's going to want to
2 address that issue as well.

3 MR. O'NEILL: I'm sure they take a different view,
4 Your Honor.

5 THE COURT: Well, this wasn't addressed in the briefs
6 but --

7 MR. O'NEILL: Uh-huh.

8 THE COURT: -- it was your -- you made a pretty good
9 argument that -- whether it's a winning argument we'll see --
10 but you made a pretty good argument that the restitution
11 payments would be pre-petition unsecured claims. But it seemed
12 to me that Ally signed on that it will make all reimbursement
13 remediation payments.

14 So let's put aside the issue of the ridiculous cost of
15 the independent foreclosure review. But in terms of amounts
16 that borrowers would be entitled to receive, if those claims
17 are general unsecured claims -- I don't know what recovery
18 estimates are being floated at this point; but just pick a
19 number out of the air assuming that unsecured creditors will
20 recover ten percent, twenty percent; I don't know; pick a
21 number -- would Ally be liable for the shortfall in the
22 remediation or restitution payments?

23 MR. O'NEILL: Under the language that you've
24 identified, I think the committee's position is the
25 shortfall -- it would be responsible for the shortfall.

1 THE COURT: The -- yes. And if one looks at page 2 of
2 the consent order, the first full "whereas" clause on the page,
3 I believe that's defining Ally Financial as one of the mortgage
4 servicing companies. Mr. Schrock's shaking his head no, but
5 he'll address that issue. It says, "Whereas Ally Financial
6 engages in the business of servicing residential mortgage loans
7 through varies indirect subsidiaries including GMAC Mortgage
8 and its subsidiaries, collectively the 'mortgage servicing
9 companies'."

10 So when I read the "whereas" clause on page 2 and
11 paragraph 3(d) on page 14, it looked to me that if you're
12 correct that the restitution payments would be pre-petition
13 unsecured claims, the Fed could then look to Ally to make up
14 the shortfall.

15 MR. O'NEILL: I agree with your reading, Your Honor.

16 THE COURT: Okay. Anything else you want to add Mr.
17 O'Neill?

18 MR. O'NEILL: No, I think, Your Honor, that's good
19 enough for us for now. Thank you.

20 THE COURT: All right.

21 Anybody else in support of the debtors' motion? All
22 right. Let me hear the opposition. Who wants to speak in
23 opposition to the debtors' 3013 motion? Mr. Schrock?

24 MR. SCHROCK: Sure. Good morning, Your Honor. Ray
25 Schrock. I've also got my partner here, Greg Skidmore with me,

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1 on behalf of AFI and Ally Bank. Your Honor, I plan to address
2 all of the issues other than jurisdiction which my partner is
3 prepared to address --

4 THE COURT: Okay.

5 MR. SCHROCK: -- if Your Honor has questions. I don't
6 know in which order you'd like to proceed --

7 THE COURT: No, go ahead.

8 MR. SCHROCK: -- but I'm happy to just move forward.

9 THE COURT: As you know, I don't hesitate to ask
10 questions.

11 MR. SCHROCK: Okay.

12 THE COURT: I didn't think it was that funny but --

13 MR. SCHROCK: It's pretty -- it was funny. So, Your
14 Honor, as I read the debtors' motion, just to clarify, and I
15 think you clarified this earlier, they're seeking effectively a
16 ruling that the future FRB obligations under the consent order
17 are dischargeable as unsecured claims. That's really the
18 relief that's requested by the classification motion. They're
19 also requesting what we think is an advisory ruling on the
20 automatic stay.

21 The debtors have clarified, I think, that's it's
22 prospective. The nature of the order doesn't really spell that
23 out, but I want to get that out there on the record.

24 And I want to get to Your Honor's questions. But I
25 think it's really important, Judge, that we understand the

1 context and the history in which these obligations are in place
2 in this case. I know Your Honor's read the briefs. I'm not
3 going to belabor it. But this notion of regulatory compliance
4 was a hallmark, a cornerstone, of putting this case on the path
5 to saving 3,400 jobs, getting a massive value, frankly, for the
6 business that otherwise would've been liquidated -- getting the
7 consent -- and it's a regulated enterprise; the FDIC, the Fed,
8 the GSEs, the buyers -- to get everybody on board with selling
9 this business -- a bank holding company subsidiary as a going
10 concern, all predicated on regulatory compliance. I think the
11 state regulators, the DOJ, everyone would agree with that.

12 That's why the PwC motion was initially brought.

13 That's why the debtors -- and I'm sure Your Honor's looked back
14 at the transcript. There the debtor said that it --

15 THE COURT: I didn't; you quoted it. Go ahead.

16 MR. SCHROCK: Okay. Your Honor, I won't belabor it.

17 They think that complying with the consent order is certainly
18 paying for the cost. And we certainly share that view. It is
19 for that reason that regulatory compliance -- this wasn't
20 addressed in the opposition -- was in other orders in this
21 court. For instance, it's in the cash collateral order in
22 paragraph 20(c) and paragraph 21, that's it's a termination
23 event if the consent obligations are not complied with. It's
24 in the sub-servicing agreement that's before the Court that you
25 have to comply with consent obligations. There's ripple

1 effects that I think really -- I really think that the debtors
2 did not think this through when bringing the motion. There's
3 ripple effects across many aspects of this. And we do see --
4 the debtor still has a billion dollars in loans -- FHA, VHA
5 loans. They filed a KEIP and KERP motion last night. They
6 talk about all of the substantial things that are going to have
7 to occur over the next year.

8 THE COURT: Stay on the motion that's before the
9 Court.

10 MR. SCHROCK: Sure. Our point is, Judge, that simply
11 this -- there can be no dispute that consent order compliance
12 and regulatory compliance has generated significant value for
13 these estates. And, in fact, in the sale order there were
14 certain obligations that Ocwen said, I understand, I'm going to
15 operate the business in compliance with all the DOJ and consent
16 order obligations. The estate is conducting the foreclosure
17 review obligations. Certainly that deal generated substantial
18 value for the estates by, at least, I presume -- presumably at
19 least by the amount of the PwC foreclosure obligations.

20 It also induced Ally to support the debtors through
21 these cases. It's just not one of these issues that's unclear.

22 THE COURT: Let me ask you this.

23 MR. SCHROCK: Yes.

24 THE COURT: If -- let's assume this case had taken a
25 completely different path.

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1 MR. SCHROCK: Uh-huh.

2 THE COURT: Ally refused to provide any support for
3 the debtors.

4 MR. SCHROCK: Uh-huh.

5 THE COURT: Just assume the case had converted to a
6 Chapter 7 case at the start. But the debtors had signed a
7 consent with the Federal Reserve Board and Ally had agreed to
8 be secondarily liable for the cost of doing it. What would've
9 happened then? I mean, what would Ally have been on the hook
10 for at that point? I mean, the consultants would've had to
11 have been hired to do this independent foreclosure review of
12 this dead entity. And --

13 MR. SCHROCK: The --

14 THE COURT: -- then Ally would've been on the hook for
15 the price tag?

16 MR. SCHROCK: Judge, I think the -- in your
17 hypothetical there's a Chapter 7 case, the debtors are still
18 bound by the consent order, they have to conduct the review,
19 and if they --

20 THE COURT: They don't have any money to pay any
21 consultants.

22 MR. SCHROCK: -- if they breach their obligations
23 under the consent order by not complying --

24 THE COURT: They say they're ready to go through with
25 the independent foreclosure review. They just want you to pay

1 for it.

2 MR. SCHROCK: But, Your Honor, that is not compliance
3 with the consent order. The Fed, whose order it is, would
4 certainly never say that, that it's compliant by converting it
5 into --

6 THE COURT: Why isn't it in compliance?

7 MR. SCHROCK: Because performance. There's many
8 things here. It talks about conducting the foreclosure review,
9 retaining the consultants. We actually addressed this issue,
10 Your Honor, at the PwC hearing and talked about this but that's
11 the whole reason the debtors brought the PwC motion in the
12 first place. They said because it is compliance. I don't
13 think anyone would dispute that. And, in fact, when you look
14 at the arguments --

15 THE COURT: Well, sure. So they bring the motion.

16 MR. SCHROCK: Yes.

17 THE COURT: PwC gets engaged.

18 MR. SCHROCK: Yes.

19 THE COURT: The debtors don't have any money to pay
20 for it. And you've signed an engagement letter with PwC that
21 says you're jointly and severally liable for it.

22 MR. SCHROCK: Judge, no dispute that we signed the
23 engagement letter. Okay. Their professionals want to ensure
24 they get paid. The question is are you breaching the consent
25 order when you don't pay? The ques -- the answer to that

1 question --

2 THE COURT: Would they have breached the consent order
3 by --

4 MR. SCHROCK: Failing to pay --

5 THE COURT: -- converting to a Chapter 7 and not
6 having the money to pay?

7 MR. SCHROCK: By not paying the consultants, there is
8 a breach of the consent order. And, in fact, when you look at
9 101(b)(5), which is the basis of parties arguing for a claim,
10 it talks about an equitable remedy that for breach of
11 performance that gives rise to a right to payment. It's
12 logically inconsistent, the position that's been taken.

13 But absolutely, Judge. Yeah. Would there be a breach
14 of the consent order? Yes.

15 THE COURT: Show me the paragraph. I have the consent
16 order in front of me.

17 MR. SCHROCK: Sure.

18 THE COURT: I'd like to see what paragraph of the
19 consent order would be breached if the debtors just simply
20 didn't have the money to pay.

21 MR. SCHROCK: Your Honor, our view has always been
22 that the obligation under 3(a) to retain the consultant,
23 encompassed within that is the right to be paid. And the
24 Federal Reserve Board whose orde --

25 THE COURT: And they assured it by having an

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1 engagement letter that makes Ally jointly and severally liable
2 for the payment. Is there something -- I don't see, I have
3 (a) open.

4 MR. SCHROCK: Yeah.

5 THE COURT: Show me the language in the consent order
6 that says the failure of Residential Capital or GMAC to pay the
7 consultants as and when due, is a breach of the consent order
8 in words or in substance. I didn't find that.

9 MR. SCHROCK: Your Honor, I don't think it says it
10 that clearly. But what I can tell you is the supplemental
11 agreement, the entire contemplation of that agreement is that
12 if, for whatever reason, there is a breach of the consent
13 order, and that's when Ally would have to step in -- and Ally's
14 not liable under the consent order; it's under the supplemental
15 agreement -- the Fed wanted assurances that if that happens, if
16 the cases go south, that you, as our primary regulated entity,
17 are going to step up and pay for it. And we'll stand by our
18 commitments. We've never -- we'll honor our commitments with
19 the Fed.

20 THE COURT: I'm glad the case has never taken that
21 turn.

22 MR. SCHROCK: Yes.

23 THE COURT: And yes --

24 MR. SCHROCK: Me too, Judge.

25 THE COURT: A lot has been accomplished --

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1 MR. SCHROCK: Yes.

2 THE COURT: -- in the case so far.

3 MR. SCHROCK: Yes. Absolutely, Judge. But, Your
4 Honor, I think you have to look at it in the context of it's
5 the Fed's order, what the Fed has said it means, what the
6 supplemental agreement --

7 THE COURT: That never quite said -- I read over the
8 Fed's brief on this issue, and they never really --

9 MR. SCHROCK: Right. Well --

10 THE COURT: -- deal with this issue. They say the
11 consent order has to be complied with. The obligation to
12 conduct the independent foreclosure review is in place and it
13 must be complied with. They didn't say whether Ally has to pay
14 for it or the debtors have to pay for it. Did I miss
15 something?

16 MR. SCHROCK: In their written papers?

17 THE COURT: Yes.

18 MR. SCHROCK: No, you didn't miss anything, Judge.

19 THE COURT: I didn't think so.

20 MR. SCHROCK: But, I'll tell you. I've asked them.
21 They're here. Certainly you can ask.

22 THE COURT: We'll let them speak for themselves, okay?

23 MR. SCHROCK: Yes. Fair enough, Judge. I can tell
24 you just what we've been told.

25 THE COURT: I would like you to address for me this

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1 issue of the appropriate treatment of restitution payments,
2 whether they're general unsecured claims or administrative
3 claims, and if they are general unsecured claims do you agree
4 that Ally Financial would be obligated under the consent to
5 make up any shortfall? So if unsecured creditors got fifty
6 cents on the dollar or twenty cents or whatever that number is,
7 Ally, by virtue of the consent, has agreed that restitution or
8 reimbursement payments will be made in full.

9 MR. SCHROCK: The short answer is, Judge, that's not
10 the way I read the consent.

11 THE COURT: Well, show -- take me through it, okay?

12 MR. SCHROCK: Okay.

13 THE COURT: Because that --

14 MR. SCHROCK: Yes.

15 THE COURT: I did spend some time looking at it --

16 MR. SCHROCK: Yes.

17 THE COURT: -- to try to --

18 MR. SCHROCK: Yes. I've spent a little time with it,
19 unfortunately, as well, Your Honor.

20 It does define collectively the mortgage servicing
21 companies, right?

22 THE COURT: Including Ally --

23 MR. SCHROCK: But -- right.

24 THE COURT: -- Financial.

25 MR. SCHROCK: No, it says -- well, it says GMAC

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1 Mortgage and its subsidiaries, collectively the "Mortgage
2 Servicing Companies". And if you look at all of the
3 obligations under the consent order, those --

4 THE COURT: No, that's not what it says. Because it
5 says, "Ally Financial" --

6 MR. SCHROCK: Um-hum.

7 THE COURT: -- "engages in the business of servicing
8 residential mortgage loans through various indirect
9 subsidiaries, including GMAC Mortgage and its subsidiaries
10 (collectively, the 'Mortgage Servicing Companies')". I don't
11 see it as excluding Ally Financial from the definition of
12 "Mortgage Servicing Companies", particularly when you
13 acknowledge that Ally Financial is secondarily liable, and
14 you've acknowledged that throughout.

15 MR. SCHROCK: Your Honor, could you take a look at
16 page 4?

17 THE COURT: Sure. Just a second.

18 MR. SCHROCK: The last whereas clause.

19 THE COURT: Hang on. Page 4. Yes. I'm on page 4.

20 MR. SCHROCK: Okay. It says, and I'll read it.

21 "Whereas, it is the common goal of the Board of
22 Governors, the Federal Reserve Bank, Ally Financial, ResCap,
23 and the Mortgage Servicing Companies".

24 Okay? You can only read that whereas clause in
25 conjunction with the defined term to mean that it's the

1 subsidiaries of ResCap.

2 THE COURT: Does that mean that ResCap is not a
3 mortgage servicing company?

4 MR. SCHROCK: Under the defined term that's correct.

5 That's correct. I have to check that, Your Honor, but I
6 believe that's correct.

7 But, Your Honor, when you look at the supplemental
8 agreement, it also makes clear that those obligations under
9 paragraph 3 and 4 of the consent order are those of -- I'm
10 going to say the debtors generically, and that Ally --

11 THE COURT: What is your --

12 MR. SCHROCK: They wanted Ally to be secondarily --

13 THE COURT: What is your position as to whether
14 restitution payments would be general unsecured claims or
15 administrative claims? You didn't address that in your brief.

16 MR. SCHROCK: Well, it's in the reply as I recall,
17 Your Honor. The restitution payment, one, I don't think that
18 Ally is liable for the reasons that --

19 THE COURT: Let's put that --

20 MR. SCHROCK: -- as state --

21 THE COURT: We'll deal with that separately.

22 MR. SCHROCK: And --

23 THE COURT: What is it that Ally --

24 MR. SCHROCK: -- the auth --

25 THE COURT: What is it that Ally signed up to be

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1 secondarily liable for? I thought it was all of the
2 obligations under the consent.

3 MR. SCHROCK: It is secondarily liable, certainly, for
4 paragraphs 3 and 4 of the consent. If you want to pull up the
5 supplemental agreement, it's in 4 -- just a moment.

6 So the Res -- it's defined as the ResCap obligations
7 on page 2, Your Honor, if you have it handy, Judge, the
8 supplemental agreement.

9 THE COURT: I don't. Actually, I didn't pull that one
10 out with me. Do you have an extra copy by any chance?

11 MR. SCHROCK: Yes.

12 THE COURT: Thank you, Mr. Schrock. Go ahead.

13 MR. SCHROCK: So this talks about the ResCap
14 obligations, and the monetary reimbursement or remediation
15 payments under paragraphs 3(c) and (d), defined as the ResCap
16 obligations.

17 THE COURT: So ResCap is obligated to pay fifty
18 million dollars in restitution, but it's a general unsecured
19 claim so they'll only pay a fraction of that.

20 MR. SCHROCK: Yes.

21 THE COURT: Isn't Ally Financial obligated for the
22 balance?

23 MR. SCHROCK: If ResCap -- I think, Judge, if ResCap
24 were to breach the --

25 THE COURT: Well, it's not a breach. If the Court

1 determines --

2 MR. SCHROCK: Yes.

3 THE COURT: -- that restitution payments are a general
4 unsecured claim, assumed, repealed, affirmed --

5 MR. SCHROCK: I would just --

6 THE COURT: -- wouldn't Ally be obligated --

7 MR. SCHROCK: I --

8 THE COURT: -- the obligation is fifty million, but
9 because the debtors pay pro rata, they pay twenty-five million,
10 twenty million -- we'll see what the number winds up being --
11 is Ally Financial obligated for the balance? They've signed up
12 for the full amount of the obligation. The obligation is only
13 being satisfied by the debtors to a much smaller amount.

14 I mean, this issue is important, because from the
15 Fed's standpoint --

16 MR. SCHROCK: Um-hum.

17 THE COURT: -- the Fed wants the money going to those
18 who are injured.

19 MR. SCHROCK: Um-hum.

20 THE COURT: Okay? And I think it's important to the
21 Fed to note is that going to happen, is it not going to happen?

22 MR. SCHROCK: Judge, the --

23 THE COURT: Okay?

24 MR. SCHROCK: We're, to be clear, it appears, I'm
25 standing up here at the podium, it looks like yes, Ally, if --

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1 and I have to qualify this again, because it is an important
2 distinction -- if ResCap were to breach its obligations under
3 the consent order and our secondary liability kicked in under
4 this order, then --

5 THE COURT: Can I ask? I don't see the breach
6 language? I don't see breach. I just see that --

7 MR. SCHROCK: Secondary liability.

8 THE COURT: Secondary liability not -- you keep --

9 MR. SCHROCK: All right.

10 THE COURT: -- adding breach, but I don't see that.

11 MR. SCHROCK: Well, Judge, I think that's what
12 happens.

13 THE COURT: Well, you say that, but show it to me.

14 MR. SCHROCK: I can't --

15 THE COURT: You might like it to be that way.

16 MR. SCHROCK: Judge -- Judge, if they don't comply --
17 our position is if they don't comply --

18 THE COURT: Compliance, look.

19 MR. SCHROCK: Okay.

20 THE COURT: Take the hypothetical of we'll deal
21 separately with the cost of the independent foreclosure review.

22 MR. SCHROCK: Um-hum.

23 THE COURT: But the argument, and I'm going to give
24 you a chance to file a supplemental brief on this, because I
25 thought --

1 MR. SCHROCK: Thank you.

2 THE COURT: -- it really did come in the committee's
3 reply. They didn't address this issue of what the consequences
4 of it being an unsecured claim, but that was what raised the
5 question in my mind about okay, if it's an unsecured claim what
6 do borrowers, injured borrowers receive. Okay? And that's
7 when it brought me back to the consent order, to Ally being
8 secondarily liable for the obligation. The obligation, it does
9 seem to me, is the fifty million. The satisfaction of the
10 obligation if it's a general unsecured claim is the pro rata
11 distribution. It's less. It's like, I mean, a guarantor. If
12 the debtor winds up paying a fraction of the obligation the
13 guarantor is going to be liable for the balance. It doesn't
14 get to say well, they paid what they could. We're not liable
15 for any more than that. Why aren't you, in essence,
16 guaranteeing the full obligation of the debtors to make
17 restitution payments? If it turns out that's all well and
18 good, but it's a general unsecured claim, it's only being paid
19 a fraction.

20 MR. SCHROCK: Your Honor, to be honest, it's something
21 we're -- we'd like the opportunity to brief it further.

22 THE COURT: And I --

23 MR. SCHROCK: I think that's fair. It's a fair
24 question. I do think that there are issues associated with
25 whether or not that's a breach and whether or not ResCap could

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1 discharge that liability, because that's presuming that that
2 liability could be discharged.

3 THE COURT: Well, if it's a -- yes, it does.

4 MR. SCHROCK: Because it's --

5 THE COURT: It presumes --

6 MR. SCHROCK: It's including --

7 THE COURT: -- it's a general unsecured claim and --

8 MR. SCHROCK: Yes. It's presuming it's a claim. It's
9 presuming that it's not a regulatory obligation that can't be
10 discharged. And I hate to take it piecemeal out of context
11 and, frankly, just, kind of, ad hoc at the podium.

12 THE COURT: I may have caught you on the spot on this.

13 MR. SCHROCK: Yes. You got me. I was supposed to
14 call Greg Skidmore up here when that happened, but that didn't
15 work out.

16 Okay, Judge. Back to -- I just wanted to hit a couple
17 of more points.

18 THE COURT: Go ahead.

19 MR. SCHROCK: Are there any other points?

20 THE COURT: I won't hesitate to ask if there are.

21 MR. SCHROCK: Okay. All right. So I'll move on.

22 Your Honor, I think there's been a lot of discussion
23 about the efficiency of the FRB's review, but I want to point
24 out that that's really not relevant to -- this is a court of
25 equity, I admit, and I'd not sitting here defending the PwC

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1 foreclosure review, but as to whether or not it is a
2 nondischargeable obligation of the debtors, I do not think it's
3 relevant. I wish that they would reach an alternative
4 resolution.

5 THE COURT: Join in the discussion.

6 MR. SCHROCK: But, Judge, then there's a breach of the
7 order.

8 THE COURT: There's nothing in the order that says you
9 can't discuss an alternative structure with the FRB.

10 MR. SCHROCK: Right.

11 THE COURT: I just, I understand your position, Mr.
12 Schrock, that this is the debtors' problem, not your problem.

13 MR. SCHROCK: Um-hum.

14 THE COURT: You've made that point quite often in the
15 case.

16 MR. SCHROCK: Yes.

17 THE COURT: I flagged the issue today of if the
18 committee is correct as to the restitution payments being
19 general unsecured claims which are paid pro rata, it's your
20 problem too. So don't divorce yourself. You can't divorce
21 yourself from the problem.

22 MR. SCHROCK: Your Honor, we haven't divorced
23 ourselves from the discussions, and we're always willing to
24 talk to folks. I just think that on this particular one -- I
25 don't want to get into settlement discussions, but I hear --

1 THE COURT: No, I don't want to get in either, but --

2 MR. SCHROCK: Heard loud and clear, judge.

3 THE COURT: I don't know whether this issue has gotten
4 raised in the discussions. I don't want to know what's in the
5 discussions. Go ahead, Mr. Schrock.

6 MR. SCHROCK: Your Honor, we do believe that the
7 consent order does have a dual purpose under Chateaugay. It
8 has a compliance aspect, when you read through it, that's
9 forward looking, and it has a remedial portion that
10 undoubtedly, at the time the consent order was entered, was, in
11 fact, such that it should not be a claim. The obligations
12 under the consent order should not be a claim.

13 And you have to look at this in the context of an
14 ongoing business sale, and I think the example you used was a
15 good one, but let's just use the facts we have here. All of
16 the debtors' employees -- not all of them -- 3,400 of them are
17 now with Ocwen. There are compliance standards that Ocwen has
18 agreed, as they must, to adhere to. These foreclosure review
19 obligations are also -- they're instructive. There's a report
20 prepared. We're talking about, yes, two different entities,
21 but much like an ongoing business, a business that's still
22 operating. This entire consent order, we believe, does have a
23 dual purpose, and we think that should be taken into account by
24 the Court.

25 Judge, we don't -- we are not big fans of the "changed

1 in circumstances" argument. I think Your Honor has hit on that
2 a lot. I think the changed circumstances, frankly, is that the
3 sale has closed. Certainly the debtors, no one was here in
4 mid-January when the Federal Reserve was striking deals with
5 other institutions saying let's convert this into an unsecured
6 claim.

7 THE COURT: So, look. Everybody who's filed -- well,
8 almost everybody who's filed a claim has agreed that the
9 independent foreclosure review, as established by the consent
10 decree, as the testimony of Chairman Bernanke shows, makes no
11 sense. Okay? No one's disputing that.

12 MR. SCHROCK: Okay.

13 THE COURT: Okay? The Fed doesn't really dispute it.
14 They just say that's the obligation unless an amendment is
15 agreed upon. The question is what replaces it. And I don't
16 have the power to replace it. What replaces it has to be the
17 result of a consensual agreement by the parties to the consent.

18 MR. SCHROCK: I agree with that. I'm not going to hit
19 this. Judge, the standing arguments on the sale order, we just
20 don't think they're correct.

21 THE COURT: But every chance the committee had it
22 reserved its rights. You don't dispute that.

23 MR. SCHROCK: I don't dispute that they reserved their
24 rights. I also don't dispute that the United States, that
25 everyone, and the debtors' statements saying we're going to

1 continue to comply, and in light of the fact that as, Your
2 Honor noted, the PwC hearing, the examiner was taking a look at
3 certain issues here, as well. There's always a reservation of
4 rights. We saw it as in the form of contribution.

5 I understand what the language says, and I think we
6 made our point and we'll rest on our papers.

7 THE COURT: Okay. Any other points, Mr. Schrock?

8 MR. SCHROCK: Just one last one, and then I'll sit
9 down.

10 Judge, I just want to point out that I think the
11 debtors are really asking you to do something pretty unique by
12 this motion and interpret what it means to be --

13 THE COURT: That's one of the things I agree with you
14 on today.

15 MR. SCHROCK: -- a regulatory compliant, and it's a
16 slippery slope to, all right, we're going to go to the DOJ,
17 state regulators, if we don't like what compliance means and
18 ask the Court to look at those, as well because I think about
19 other cases in the EPA context. I just think it's a really
20 troubling request in that regard, putting aside, and we haven't
21 even gotten into it -- I'm going to sit down -- but there's
22 unattended consequences, I think, under a lot of agreements
23 that should be reviewed by the debtors before they say that
24 they're not going to comply with the regulatory obligations
25 when they still have a billion dollars in --

1 THE COURT: They've said clearly they're going to
2 comply unless the Court enters an order that relieves them of
3 it. They haven't deviated from that statement. Have they?

4 MR. SCHROCK: No. And you heard my position on what
5 comply means.

6 THE COURT: Thank you, Mr. Schrock.

7 MR. SCHROCK: Thank you.

8 THE COURT: Who else wants to be heard?

9 MR. SKIDMORE: Good morning, Your Honor. Greg
10 Skidmore, Kirkland & Ellis, also on behalf of Ally. Just two
11 brief points, Your Honor. The first is on the stipulations
12 that Mr. Rains read into the record at the beginning of the
13 hearing. I heard Mr. Rains say in one of the stipulations that
14 Ally's secondary liability comes under both the consent order
15 and the side agreement. And I may have misunderstood what Mr.
16 Rains said, or we may have had a misunderstanding beforehand,
17 but I just want to clarify that Ally is secondarily liable
18 under the terms of the side agreement between Ally and Federal
19 Reserve, not under the consent agreement. And I think the
20 debtors will agree with that, but I just want to clarify that.

21 MR. RAINS: No objection, Your Honor.

22 THE COURT: Okay. Thank you.

23 MR. SKIDMORE: And, Your Honor, I just want to make a
24 very brief point on jurisdiction, if Your Honor wants to hear
25 it.

1 THE COURT: Yes. Go ahead.

2 MR. SKIDMORE: So first, Your Honor, obviously we have
3 the plain text of the statute that Congress set forward that no
4 court may affect or modify a federal banking agency order. And
5 that's exactly what the debtors are asking this Court to do
6 here.

7 THE COURT: Well, let me stop you there, because they
8 say they're not asking me to do that. Let me focus in on the
9 issue of the restitution payments.

10 They say the order is what the order is, and the
11 committee says that, but restitution payments are pre-petition
12 unsecured claims. There's nothing in the order that addresses
13 that, nor do I think there is anything in the order that could
14 have addressed that. That's for the bankruptcy court to
15 determine. It simply says what it says about restitution and
16 reimbursement.

17 So if the process were carried through and it was
18 determined that homeowner X is entitled to restitution of
19 100,000 dollars, I'm not deciding at the moment, but if the
20 committee is correct that restitution payments, even resulting
21 from an administrative proceeding, if it's conduct prior to the
22 petition as a pre-petition unsecured claim, the claim is
23 allowed. It's paid at the pro rata share. That's not a
24 modification of the consent order, is it?

25 MR. SKIDMORE: Your Honor, a few points on that.

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1 First, we'll definitely address that in our supplemental brief
2 on this issue of the restitution payments, but what the debtors
3 are asking this Court to do is change the method of the payment
4 under the consent order. And counsel for the debtors, when
5 they were up here earlier, said that the option to make a
6 consent payment to the Federal Reserve is not part of the
7 consent order.

8 THE COURT: But look. They can't make a payment
9 without the approval of this Court.

10 MR. SKIDMORE: Correct.

11 THE COURT: Okay. They've not asked that that be
12 changed. What is it that they've asked to -- I understand I'm
13 separating out and that they don't want to do that, but I'm
14 separating out the costs of the independent foreclosure review
15 versus what's supposed to happen after that's completed, the
16 restitution reimbursement payments. I'm not deciding either
17 issue now, but the arguments for unsecured claim are stronger
18 with respect to the restitution payments. So let's assume that
19 that's the Court's determination at the end of the day, that
20 the Court determines that unless the Fed agrees otherwise, the
21 independent foreclosure review has to be conducted and that the
22 debtor has to pay the cost of it.

23 With respect to the restitution payments, once those
24 amounts are determined it's a general unsecured claim. It will
25 be paid in accordance with any plan, and Ally may be liable for

1 the balance.

2 You say I don't have the power to do that?

3 MR. SKIDMORE: Your Honor, just to be clear. This
4 Court always has the power to decide what it can and can't do.

5 THE COURT: No, no, no.

6 MR. SKIDMORE: And --

7 THE COURT: But I -- but yes, but lawyers frequently
8 tell me what I can and can't. I may not agree with them, but
9 I'm asking you, do you agree with that, with laying the consent
10 order side by side with the Bankruptcy Code? Everyone seems to
11 agree I can't modify the consent order. I have no intention of
12 doing so, all right?

13 Then you look at the overlay of the bankruptcy. What
14 is it that I can do? What is it the consent order doesn't
15 address, makes no attempt to address. The consent order
16 doesn't have anything in it that would override the priorities
17 of the Bankruptcy Code, correct?

18 MR. SKIDMORE: I agree with that, that that language
19 does not appear, Your Honor. And if Your Honor was not
20 effecting or modifying the terms of the consent order, then I
21 agree that the statute 1818 would not divest this Court of
22 jurisdiction to do so. And I don't want to lay a lot of
23 concrete on the bankruptcy issue lest my partner come up and
24 yell at me, but we'll address that in the supplemental brief,
25 Your Honor, and that specific point.

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1 THE COURT: Thank you, Mr. Skidmore.

2 All right. Who else wants to be heard?

3 MR. SCHROCK: Your Honor, may -- I just have one
4 really quick point. We reserved rights on --

5 THE COURT: I'm getting tag-teamed. Go ahead.

6 MR. SCHROCK: I know. I'm not testing you.

7 THE COURT: Go ahead.

8 MR. SCHROCK: We reserved rights, and we just briefed
9 the admin claim issue. Our view on the admin claim has always
10 been it's not ripe, that if it comes to a point where we need
11 to decide -- we end up, for whatever reason, Ally had to pay,
12 there's an examiner report coming out -- I think that one's
13 going to require a lot more evidence, and there's going to have
14 to be a, frankly, a trial around it. I just didn't want to
15 have that be misunderstood, because we do think it's premature
16 and not ripe.

17 THE COURT: All right. Who else wants to be heard?

18 MS. SUTTON: I'm Jennifer Sutton with the Board of
19 Governors of the Federal Reserve System. I'd be pleased to
20 answer some questions that may have arisen today and also to
21 make a few statements on behalf of the Board of Governors.

22 I am concerned that neither the statute under which we
23 issued our order or the order itself have been accurately
24 characterized, really, by any of the parties here today, and so
25 the Board's primary objective in objecting was to try and

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1 correct any misapprehensions or mischaracterizations,
2 misapprehensions that the Court may have been left with based
3 on the statements that have been made in the other pleadings.

4 To go back to some of the earlier statements that were
5 made about Section 1818(b) of the Federal Deposit Insurance
6 Act, as I'm sure you know, Your Honor, that statute authorizes
7 the Board, when it has found that an institution it regulates
8 has engaged in unsafe or unsound practices or violations of
9 law, it gives the Board the authority to require that
10 institution to take affirmative actions to correct or to
11 ameliorate the problems that may have occurred as a result of
12 that misconduct.

13 The statute didn't specify. This goes on to specify
14 what some of those affirmative actions can be. They can be
15 restitution, and, as the other parties have pointed out, it can
16 also be rule of remediation, restitution and reimbursement.

17 THE COURT: Is there anything in your governing
18 statute that says that restitution means payment in full even
19 if bankruptcy law would determine that it's a general unsecured
20 claim that's paid pro rata?

21 I mean, this is really -- I mean, you may be able
22 to -- I'm sure Ally will have something else to say about it
23 yet in a supplemental brief, but you've got an argument that if
24 there is a shortfall in any restitution payments that Ally has
25 got to pay the balance, but I don't see anything in your -- and

1 I'm not an expert on your governing statute. I did read it. I
2 have paid -- I've spent time. You really didn't address this
3 issue.

4 Now, I see a difference between the restitution
5 payments on the one hand and the costs of doing the independent
6 foreclosure review, which they signed up to do. And they
7 disagree. The debtors disagree about that, and I'm not making
8 a final decision on it, but let's assume that that's where I
9 came out, that they have to, unless there's an amendment they
10 have to continue to perform. They have to continue to pay
11 those costs. But with respect to restitution payments those
12 are general unsecured claims. Is there anything in your, any
13 case law or in your statute that address that issue?

14 MS. SUTTON: I am not aware of anything that
15 specifically addresses that, Your Honor, but I would be pleased
16 to provide some supplemental briefing on that, as well.

17 THE COURT: Okay.

18 MS. SUTTON: One thing I do want to make sure this
19 Court is apprised of accurately, though, is that our order does
20 not require only restitution. Our order, by its very terms,
21 requires GMAC Mortgage to submit to us a remedial plan to
22 correct the problems that the independent consultants
23 identified.

24 Those may be misfiled deeds. They may be a wrongful
25 foreclosure that needs to be rescinded. It may be a loan

1 modification that was improperly denied and now needs to be
2 offered to a borrower. And it may be a payment, because they
3 may have overcharged someone fees and they need to reverse
4 them. So it's not -- our order does not require a "payment" to
5 anyone, let alone the Federal Reserve. It requires them to
6 undertake measures to correct the consequences of their
7 misconduct.

8 THE COURT: So but do -- I don't think anybody is
9 questioning the intent of the Fed in negotiating the structure
10 that was negotiated, not just as to these debtors, but as to
11 all the other loan servicers that are parties to consent
12 decrees.

13 The program appears to have been well intentioned, but
14 subsequent events have shown it to be completely ill-conceived.
15 When these debtors would be on the hook for 350 or 400 million
16 dollars to do a foreclosure review that would result in
17 restitution payments, hypothetically, of fifty million dollars,
18 there's something wrong with that plan.

19 It seems to me that the Fed has publicly acknowledged
20 that well-intentioned, the way it's working out doesn't make so
21 much sense; the independent consultants shouldn't be the winner
22 in this. So the Fed's been prepared to negotiate amendments.

23 The issue here is you got the counter-parties in a
24 bankruptcy proceeding. The Fed can, certainly, stand on its
25 rights and say we're not changing anything in that consent

1 order. This is what they signed up for; we agree it makes no
2 sense, whatsoever. I would have to say that seems awfully
3 punitive.

4 I'll decide the legal issues. If you're right on the
5 legal issues, you're right on the legal issues. That wouldn't
6 make it anymore sensible from anybody's standpoint to pour 350
7 or 400 million dollars down a rabbit hole, because if the Court
8 were to determine at the end of the day that restitution or
9 reimbursement payments are general unsecured claims the pro
10 rata share of what the injured borrowers are going to recover
11 is going to go down with every other creditors' recovery, every
12 dollar spent for the foreclosure review is one less dollar
13 available to satisfy creditor claims, and that may very well
14 include the injured borrowers.

15 I don't get -- and I know I don't know what the
16 details of your discussions have been, I know there have been
17 meetings and exchanged proposals, and the parties will either
18 work it out, or they won't work it out. I would just observe,
19 I've already done it, what exists makes absolutely no sense. I
20 don't -- you're not really trying to defend from an economic
21 standpoint the present structure, I take it.

22 MS. SUTTON: No. No, Your Honor.

23 THE COURT: Okay.

24 MS. SUTTON: And I think our chairman has --

25 THE COURT: He said it.

1 MS. SUTTON: You know I won't even -- his words speak
2 for themselves.

3 THE COURT: Yes.

4 MS. SUTTON: What I am here defending is a lawfully
5 entered order that is enforceable in a court of law, and
6 compliance with that order.

7 THE COURT: I understand that position completely.

8 MS. SUTTON: And if I may, Your Honor?

9 THE COURT: Go ahead.

10 MS. SUTTON: It is accurate that other institutions
11 have entered into an arrangement with us to satisfy the
12 requirements of that order.

13 THE COURT: Are any of them in bankruptcy proceedings?

14 MS. SUTTON: I -- none of the Federal Reserve-
15 regulated entities; I'm not sure about Office of the
16 Comptroller of the currency-regulated entities, but none of the
17 Federal Reserve-regulated entities are.

18 THE COURT: Anything else you want to add?

19 MS. SUTTON: I just want to make clear that we believe
20 Chateaugay is also distinguishable to the extent that it's
21 relied on; it involved environmental injunctions, and statutory
22 right of an agency to get reimbursed for costs it incurred
23 itself, or to have the entity do the remedial measures itself.

24 As you've already observed, there's nothing on the
25 face of our statute that authorizes us to take the remedial

1 measures that we've ordered our institution to take and then to
2 seek reimbursement from the institution. Likewise, there's
3 nothing in the consent order or 1818, itself, that entitles the
4 Board to any form of right to payment, nor have any of the
5 parties identified what the breach would be that would entitle
6 us to a right to payment.

7 THE COURT: I take it that in none of the consents, as
8 amended or otherwise, has the Fed made payments to any injured
9 borrower and sought reimbursement from the mortgage servicer.

10 MS. SUTTON: By the terms of the order?

11 THE COURT: Yes.

12 MS. SUTTON: No, there's nothing in the order that
13 provides for that.

14 THE COURT: Terms or otherwise is, I mean -- it may
15 have absolutely no bearing on the legal issue, but the
16 structure of -- because I gather the structure of these amended
17 deals have been pretty much the same -- what, it creates a
18 trust fund?

19 MS. SUTTON: Yes. Essentially, there are -- the
20 agreements are public and I'd --

21 THE COURT: Yes.

22 MS. SUTTON: -- be happy to provide you a copy.

23 THE COURT: I think I've seen some of them already.

24 MS. SUTTON: Essentially, what it does is satisfies
25 the Independent Foreclosure Review requirements imposed on

1 those other entities by them contributing to a fund that will
2 then be used to make payments to borrowers who are in-scope
3 borrowers, and those are borrowers who were in foreclosure
4 during 2009 and 2010, based on objective loan characteristics.
5 So if it appears a borrower, for example, may have not been in
6 default at the time of the foreclosure, that objective criteria
7 is used to classify the borrower and to -- and payments out of
8 the fund will be made to the borrower.

9 THE COURT: Okay. Anything else you want to add?

10 MS. SUTTON: No, unless you have further questions
11 about --

12 THE COURT: I don't.

13 MS. SUTTON: -- the agreement or -- okay.

14 THE COURT: Thank you very much.

15 MS. SUTTON: Thank you, Your Honor.

16 THE COURT: All right. Who else wants to be heard?

17 MR. LIGHTNER: Good morning, Your Honor. Mark
18 Lightner from Cleary Gottlieb Steen & Hamilton on behalf of
19 Wilmington Trust.

20 As you know we sound like kind of a broken record,
21 because every time --

22 THE COURT: You just want to be sure that if there's a
23 payment made, that it reflects the debtor that's appropriate to
24 make it and that your client, the junior secured noteholders,
25 it doesn't come out of their hide.

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1 MR. LIGHTNER: Senior unsecured noteholders --

2 THE COURT: Senior -- senior unsecured --

3 MR. LIGHTNER: -- of Residential Capital, yes.

4 THE COURT: -- sorry.

5 MR. LIGHTNER: This is exactly what I was afraid was
6 going to happen --

7 THE COURT: Sorry.

8 MR. LIGHTNER: -- which is why I wasn't going to say
9 anything.

10 THE COURT: No.

11 MR. LIGHTNER: Except you did raise an issue which I
12 don't think needs to be decided today, but we raised in our
13 papers, and that is the definition of Morgan Servicing
14 Companies as the obligors under the remediation payments. And
15 it is our position that Residential Capital -- and you raised
16 this question a few minutes ago -- is not included within that
17 definition for the reason that we stated.

18 THE COURT: Thank you.

19 Anybody else wish to be heard? Come on up, identify
20 yourself.

21 I hope you're not carrying that briefcase up because
22 you want to read everything that's in it.

23 MR. REED: No, no, no. I'm afraid the guy in the
24 second row is going to take something from it.

25 THE COURT: Okay.

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1 MR. REED: Your Honor, I am Borrower X.

2 THE COURT: Could you identify -- you have to identify
3 your --

4 MR. REED: Frank Reed.

5 THE COURT: Okay, Mr. Reed, you did file an objection.

6 MR. REED: Yes. Yes, I did. There's a couple of
7 things, Your Honor, I think that the parties of this motion
8 have left off that I would like to draw the Court's attention
9 to.

10 First thing is not everyone believes the IFR is bad in
11 function. There are three other banks that continue
12 voluntarily under the IFR and the similar consent decrees; they
13 are EverBank, OneWest, and IndyMac.

14 THE COURT: Mr. Reed, does the system that would
15 result in 350 or 400 million dollars going into the pockets of
16 very able consultants, but only, hypothetically, 50 million
17 dollars, going to borrowers, does that make sense?

18 MR. REED: Your Honor, it does, and I would like to
19 give you a hypothetical.

20 THE COURT: No, I don't answer questions, but go
21 ahead.

22 MR. REED: Or present one, which you don't have to
23 answer.

24 And that is this, if an elderly woman is mugged on
25 Bowling Green after 8 o'clock at night, and she's robbed of

1 twenty dollars, does anyone look at the expense for the
2 pursuit, capture, prosecution, and then the restitution of the
3 twenty dollars, and any kind of penalty the perpetrator of that
4 offense would have to be? So why is it that we're comparing
5 the costs for the bad behavior to be remediated. It's not
6 relevant, it's not relevant in our judicial system in many
7 other areas.

8 And, as a matter of fact, as some of the parties to
9 this motion have pointed out, that money has been found money,
10 probably more than enough to cover the expense by the
11 agreements between Ally and GMAC ResCap. They garnered more
12 value, I see it published constantly, unprecedented value,
13 unprecedented transaction.

14 THE COURT: Well, you say -- yes, they describe the
15 sale as unprecedented for a loan servicer in an insolvency
16 proceeding to be sold, but talk to Mr. Eckstein about how
17 satisfied the unsecured creditors are about what the likely
18 result of the case is. To say that the result about the sale
19 is unprecedented isn't to say that anybody is going to come out
20 of this being particularly happy at the end of the day.

21 MR. REED: I agree, and I think that is in direct
22 contrast to say a Chapter 7 liquidation versus the sale, the
23 three billion garnered in this --

24 THE COURT: This is, essentially, a liquidation case.
25 The businesses -- the two major businesses have been sold

1 already; they still have an FHA, I think, loan portfolio that
2 hasn't been sold yet. But this is, essentially, a Chapter 11
3 liquidation.

4 MR. REED: Your Honor, I don't -- it seems like that
5 is correct, but I just -- it doesn't change the position
6 that --

7 THE COURT: Well, it's going to change the position of
8 what are creditors going to recover, whatever their relative
9 priority is, and the absolute priority rule will be followed.
10 Every dollar that gets spent on the Independent Foreclosure
11 Review is one dollar less that's going to be available to
12 satisfy creditor claims.

13 The debtors haven't disputed, the committee hasn't
14 disputed that injured borrowers should get relief. I
15 understand your point, but you're going to have a hard time
16 persuading me that it's better to spend 350 or 400 million
17 dollars that you're going to take out of creditors' pockets at
18 this stage; they're not in the business anymore.

19 I would think that the most important thing is that
20 anybody who's a creditor, either because of an improper
21 foreclosure or they loaned money, or whatever, recovers as much
22 as they can at this point. You're not going to have ResCap to
23 kick around at some point.

24 MR. REED: I appreciate that, Your Honor, but you've
25 made an interesting point earlier in discussions with the other

1 parties. And that is how do you identify the individuals who
2 have been harmed?

3 THE COURT: Well, but the reality is if it costs 350
4 or 400 million dollars to identify the borrowers maybe we're
5 just better off paying everybody who was involved in a
6 foreclosure. And maybe some who some would describe as
7 undeserving will get a recovery, but they're likely to get --
8 but those who are really hurt are likely to get a greater
9 recovery than they would if this whole Independent Foreclosure
10 Review process goes forward. So there is no --

11 MR. REED: Your Honor, I bring up the second point to
12 that. And that is with Ally secondarily liable for it they
13 would -- the actual injured parties stand to be made whole.

14 THE COURT: Well, we'll see, that's going to be maybe
15 an issue between the Fed and Ally; we'll have to see.

16 MR. REED: And I have just a couple of more points,
17 Your Honor, if you don't mind. And that is -- this is in
18 relation to the Federal Reserve's objection, and it's also in
19 my objection. And that is the Independent Foreclosure Review
20 has been mischaracterized as a first step to only a financial
21 remediation payment. There are -- it is a order for specific
22 performance, a cease and desist order, that contains specific
23 performance, and at the end of the phase 1, if you will,
24 specific performance, can very well require specific
25 performance acts that are not substitutable with financial

1 remediation.

2 THE COURT: Well, look, Mr. Reed, the Federal Reserve
3 board order says what it says. We'll see what, if any, changes
4 occur voluntarily. If not voluntarily whether the Court is
5 able to do any -- I think I have your -- I read your objection.
6 Any last points you want to make?

7 MR. REED: I just think that, as a matter of public
8 policy, to be able to attack the costs, the associated costs,
9 that go along with any order of specific performance as a
10 methodology to gut specific performance orders is a de facto
11 problem, I mean it's an absurdity. It flies in the face of the
12 purpose for a specific performance order. And that's it.

13 THE COURT: All right. Thank you, Mr. Reed. Anybody
14 else quickly?

15 Mr. Rains, you want to be heard in reply? Thank you,
16 Mr. Reed.

17 MR. RAINS: Your Honor, let me first address a
18 housekeeping matter. I think the parties need to move their
19 declarations and exhibits into evidence. I don't think there's
20 been any objection. So we hereby move all of our evidence --
21 our exhibits into evidence.

22 THE COURT: Any objections?

23 UNIDENTIFIED SPEAKER: No, Your Honor.

24 THE COURT: All right, they're in evidence.

25 (Debtors' Exhibits 1 through 5 are hereby received into

1 evidence, as of this date.)

2 MR. RAINS: Judge, if I could have three minutes to
3 make three points: one minute per point.

4 If I heard the Court correctly, the Court might be
5 considering the idea of classifying the restitution payments as
6 pre-petition claims. I know the Court hasn't ruled yet, but
7 what seemed to be giving the Court trouble was the task of
8 trying to figure out who has the claim, whether there was
9 causation, whether there was liability, and what the amount of
10 the claim might be. I don't think the Court needs to be
11 concerned about that issue.

12 First, as you heard the Federal Reserve represent,
13 even if you were to decide that there is a cash payment
14 obligation that can be classified as a claim, there would be
15 objective criteria used to allocate that claim among people
16 within the class; you know the people who had foreclosure
17 proceedings in 2009 and 2010.

18 I also think that the Court could take comfort from
19 Chateaugay, because in Chateaugay --

20 THE COURT: You've made this argument already, don't
21 repeat the arguments you've made.

22 MR. RAINS: I won't repeat it, but if I could just
23 emphasize this one point. Chateaugay dealt with unmatured
24 contingent unincurred costs, and the Court was not troubled by
25 that problem. The Court realized there could be disputes in

1 the future over causation or even whether the remediation
2 action was necessary. Those didn't stop the Court from
3 concluding it was a claim.

4 Second -- if I could just throw out a question,
5 perhaps, as well. What if the debtors were to represent that
6 they would not dispute causation or liability as to everyone in
7 the capturing class? That would take away the causation and
8 liability issue, it would leave us only with an amount
9 question. Those kind of questions are easily dealt with in the
10 claims process.

11 Second, a very quick point. Ally argued that the
12 consent order, and in particular, the foreclosure review, is a
13 perspective ongoing obligation. As I said before we don't
14 think there's a dual purpose to that. All of the foregoing
15 obligations or ongoing obligations have been passed on to
16 Ocwen. We are simply trying to figure out how to remediate
17 conduct and injury that if it occurred, occurred in 2009 and
18 2010.

19 Finally, the Court asked the question what if the
20 debtor stopped paying. And I want to emphasize that's not the
21 relief we're asking for. The Court has so far approved our
22 payments. We will make them as long as the Court approves
23 them; we'll stop making them if the Court stops approving them.

24 THE COURT: I understand that, you've been very clear
25 on that.

1 MR. RAINS: But if I could get to the point, our
2 obligation, as the Court I think noted, under the consent
3 order, paragraph 3(a), is to retain a consultant. We are
4 obligated to retain them. Then we have taken on an obligation
5 of PricewaterhouseCoopers to be joint liable to pay them. The
6 way the supplemental agreement reads, the one between Ally and
7 the Fed, is that the Fed is secondarily liable as soon as the
8 debtors -- I'm sorry, Ally is secondarily liable as soon as the
9 debtors file a Chapter 11 proceeding. And the Court is
10 correct; what's secondarily liable means is the liability is
11 first with the primary obligor, and once that primary obligor
12 is unable to pay, the relief can be recovered from the
13 secondary obligor. So I think the Court has that point exactly
14 right.

15 Let me close by emphasizing something that is unusual
16 in our consent order -- you may have recognized this -- we
17 are -- Ally is the only bank holding company that is not
18 jointly liable with the mortgage servicer under the consent
19 order. All of the other parties have consent orders that make
20 the parent jointly liable; it is only ours that has the
21 secondary liability provision in it. Thank you, Your Honor.

22 THE COURT: Okay. All right, Mr. Eckstein, very
23 quickly.

24 MR. ECKSTEIN: Your Honor, if I may very quickly.
25 Just given the focus on the characterization of the claim that

1 would arise in the case under the various hypotheticals Your
2 Honor was discussing, I just want to make sure that Your Honor
3 is familiar with, and focuses on the supplemental consent order
4 that was entered into between Ally Financial and the Fed on
5 April 26th, 2012, which was approximately three weeks before
6 the bankruptcy case.

7 THE COURT: Yeah, I have that here; yeah.

8 MR. ECKSTEIN: I know Your Honor has seen it, but I
9 think it's very instructive because paragraph one essentially
10 anticipates the proceeding that we're having today. And it
11 specifically contemplates that if ResCap commences a case under
12 the Bankruptcy Code, Ally will be secondarily liable for the
13 obligations to timely pay any portion of one, the ResCap fees
14 to Pricewaterhouse; and two, the monetary reimbursement or
15 remediation payments under a remediation plan approved by the
16 Federal Reserve.

17 THE COURT: That looks pretty clear on the issue that
18 I raised earlier.

19 MR. ECKSTEIN: And it then goes on, Your Honor, in the
20 remainder of that paragraph to say, and in fact Ally
21 contemplated the debate we were having and said they would want
22 to reserve the right to argue that it's an administrative
23 claim.

24 THE COURT: The reason I'm going to stop you, Mr.
25 Eckstein, is because I raised the issue today because it came

1 to mind after I read your reply. All right? I raised the
2 questions; it hasn't really been briefed. Rather -- because
3 you're going to make your argument, then Mr. Schrock's going to
4 want to come back and argue, I want -- how much time does
5 everybody want -- one round, I want everybody's briefs at one
6 time. I see two questions I want: Are any payments for
7 restitution or reimbursement general unsecured claims? And
8 that is addressed in Mr. Eckstein and Mr. O'Neill's brief. And
9 two, would Ally Financial be liable for any shortfall in
10 restitution or reimbursement payments if they are general
11 unsecured claims and the pro rata share paid to unsecured
12 creditors less than the full amount?

13 I haven't decided anything; I want to make that clear.

14 How much time do people want?

15 Mr. Rains?

16 You know, the holiday of Passover starts on Monday
17 night, and there are some who are affected by it, different
18 levels of observance, some people may be going away.

19 MR. ECKSTEIN: Your Honor, I think parties were
20 suggesting two weeks.

21 THE COURT: Okay. So that would be what, the 11th?

22 MR. ECKSTEIN: Probably earlier than the 11th.

23 THE COURT: It's the 4th. That's the day after
24 Passover ends. You want that Mr. Eckstein? That's fine with
25 me.

1 MR. ECKSTEIN: You can make it Friday of that week,
2 maybe.

3 THE COURT: Okay. Friday, April 5th at 5 o'clock is
4 the deadline for supplemental briefs addressing the two issues
5 that I raised.

6 These issues remain -- I'm going to decide the issues;
7 no one should think otherwise -- but I've sort of made this
8 point clearly before, let me say it again. This makes no
9 sense; it makes absolutely no sense because if the Court
10 determines that the debtors have to comply with the independent
11 foreclosure review and pay for it while it's going on, you just
12 watch the money go down this hole. Everybody agrees that makes
13 no sense.

14 If the Court determines that the end result of that
15 foreclosure review are restitution payments for some general
16 unsecured claims and Ally is liable for any shortfall, the only
17 ones who will be satisfied then are the borrowers who get
18 identified for payments because they'll get what's coming to
19 them.

20 All of you need to go back and rethink your positions.
21 The Fed has shown its willingness to dispense with the
22 independent foreclosure review, but they have other
23 requirements which may not be acceptable to the unsecured
24 creditors' committee, to the debtors, to others, okay?

25 And any agreement that's struck, if it has to be

1 brought before the Court for approval, I have to review it and
2 decide, but Mr. Schrock, the point I made to you earlier -- and
3 I know Ally's position has been consistent throughout: these
4 are all obligations of the debtor, but if in fact it turns out
5 that the hypothetical fifty million dollars in restitution
6 payments are paid at a fraction of that amount and you've
7 contractually obligated yourself to -- you, your client -- to
8 the Federal Reserve to pay the shortfall, you've got skin in
9 the game. You may want to put it all off until there's some
10 grand bargain in the case that -- that should have happened
11 soon, I would hope, but this is a real issue now. Okay? And
12 the Fed needs to go back and rethink its position because it
13 may want all injured borrowers -- or all borrowers who had a
14 foreclosure -- if you conclude it makes no sense to spend 350,
15 400 million dollars to identify which borrowers when the total
16 amount that would have to be paid to them is a fraction of
17 that, but bankruptcy law is that it would be a general
18 unsecured claim -- the Fed ought to go back and rethink its
19 position. It seems to me punitive if bankruptcy law would not
20 support payment of a claim in full, for the Fed to say well,
21 that's too bad, you know. We expect it to be paid in full and
22 we're not willing to do a deal other than that. So you all
23 need to go back.

24 Frankly, I think your time over the next two weeks
25 would be better spent trying to reach an agreement. And I know

1 there have been discussions; I don't want to know what the
2 details of it are. Your time would be better spent trying to
3 reach an agreement that resolves these issues. If you all
4 conclude after another week that we're making some progress,
5 here, let's see if the Court would put off the date for those
6 supplemental briefs, contact chambers, and I'd consider it. If
7 there are good-faith discussions going on to try and resolve
8 the issue, we'll put it off. Otherwise, get the briefs in, I
9 don't need further argument, and I'll go ahead and decide. But
10 I'm going to wait for these supplemental briefs to come in.

11 Anything else today?

12 MR. SCHROCK: Just a quick question --

13 THE COURT: Mr. Schrock?

14 MR. SCHROCK: -- on that, Your Honor. Ray Schrock, on
15 behalf of AFI and Ally Bank.

16 I'm presuming -- the PwC order expires today, and
17 while this --

18 THE COURT: Court is approving them on an interim
19 basis; all of the compensation to PwC and the lawyer-
20 consultants are approved on interim basis. Submit a
21 stipulation; work out a stipulation. Don't expect me to rule
22 the same day you file the supplemental briefs, so build in a
23 little bit of a cushion, okay?

24 MR. SCHROCK: All right; thank you, sir.

25 THE COURT: Probably going to take me two weeks after

1 I get the last brief.

2 MR. ECKSTEIN: Your Honor, I believe the order is
3 going to contemplate April 11th, which was the next omnibus
4 hearing date, as the date.

5 THE COURT: Well fine, leave it -- you can put that in
6 and if I'm not ready to issue a ruling I'm going to tell you
7 right then.

8 MR. ECKSTEIN: We understand, Your Honor. We were
9 obviously hoping that you would suggest that Pricewaterhouse
10 maybe should participate in the Passover holiday and that we
11 should maybe create a moratorium --

12 THE COURT: I'd be happy if they did.

13 MR. ECKSTEIN: -- they should maybe given the
14 opportunity to enjoy.

15 THE COURT: Talk to the Fed.

16 MR. ECKSTEIN: We have, and we haven't been able to
17 accomplish that yet, and so --

18 THE COURT: Try again today. Don't --

19 MR. ECKSTEIN: We will try --

20 THE COURT: -- you got the whole afternoon.

21 MR. ECKSTEIN: -- we will try immediately to see
22 whether we can put a moratorium between now and hopefully --

23 THE COURT: Look --

24 MR. ECKSTEIN: -- a more comprehensive resolution.

25 THE COURT: -- every dollar -- it's a mistake to spend

1 another dollar on this independent foreclosure review; it's
2 just a mistake. And it's -- I'm going to leave it. But if you
3 can't work anything out, I'm not ruling.

4 Go ahead.

5 MR. LEE: Your Honor, Gary Lee from Morrison &
6 Foerster. Just to be clear, there is an open offer that --

7 THE COURT: I don't want to know what the offer is.

8 MR. LEE: No, but it's in the papers. I just want to
9 be absolutely clear, Your Honor, win or lose, we're prepared to
10 use the money that we will be currently spending on the
11 foreclosure review on borrowers. If Your Honor determines that
12 the obligation is an unsecured obligation lock, stock, and
13 barrel, we will still take the money that we would otherwise be
14 spending between today and the date of Your Honor's decision
15 and earmark it for borrowers.

16 THE COURT: Mr. Lee -- Mr. Lee, it's an offer you've
17 made to the Fed.

18 MR. LEE: Right.

19 THE COURT: They haven't stood up and said we accept
20 it. Okay? If you have an accepted offer, put it in the form
21 of a stipulation, submit it to the Court. Fine, okay?

22 Actually, on this point, if you have an agreement, you
23 could -- I'm not sure it even requires a court order at this
24 stage. You could -- if the Fed agreed that the independent
25 foreclosure review can be paused while you continue to

1 negotiate, or whatever, I don't think there's anything in any
2 court order that I've issued signed, that says no, go forward
3 and do it. What I would ask is, you put in a letter that
4 reflects the agreement. But absent an agreement between the
5 Fed and the debtors and I guess Ally as the signatory, as
6 well -- I'm not altering the obligation.

7 MR. LEE: Thank you, Your Honor.

8 THE COURT: That's full stop.

9 MS. SUTTON: If I may say one thing on this point,
10 Your Honor?

11 THE COURT: You have to identify yourself again.
12 Every time you speak --

13 MS. SUTTON: Pardon?

14 THE COURT: You need to identify yourself whenever you
15 speak on the record.

16 MS. SUTTON: Of course; yes. Jennifer Sutton, with
17 the Federal Reserve.

18 One thing the Fed is grappling with is that it's not
19 as simple as saying putting a moratorium or a halt to PwC.

20 THE COURT: I just said a pause, but -- yeah.

21 MS. SUTTON: Or even a pause, or a moratorium as the
22 debtors have characterized it.

23 We've consulted with the relevant people, and stopping
24 it would bring the wheels to a halt. And start-up costs would
25 be far more -- start-up costs would be incredible. It would be

1 almost impossible to start the machine back up again because
2 individuals would have gone on to other projects. It's not
3 simply PwC paying people at no expense for two weeks.

4 THE COURT: So the Fed would rather just have the
5 debtors keep pouring money down this hole? That's what you're
6 telling me.

7 MS. SUTTON: No, Your Honor. We have explained what
8 our expectations are as to an alternative.

9 THE COURT: Okay; I do not want to -- let me make it
10 clear. I am not getting in the negotiations with the Fed.
11 I've made my observations. It's a total waste of money. But
12 if the Fed is insisting on the debtor pouring this money down
13 the rabbit hole, that's what is going to happen until I rule.
14 So sometimes people take absolutely irrational positions, but
15 so be it. I'll decide the issues when the matter is fully
16 briefed.

17 MR. SKIDMORE: Your Honor, one last procedural thing.
18 Greg Skidmore for AFI.

19 Mr. Rains moved into evidence our five exhibits
20 attached to our motion. We'd like to move in Exhibit 6, which
21 is the Ocwen asset purchase agreement, dated November 2nd,
22 2012; Exhibit 7, the amendment to the asset purchase agreement.
23 And then if we need to, Exhibit 8, which is the sale order,
24 which is docket 2246; and Exhibit 9, which is the cash
25 collateral order, which is docket 491.

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1 THE COURT: Any objection, Mr. Rains?

2 MR. RAINS: No, Your Honor.

3 THE COURT: All right; they're in evidence.

4 (Ocwen asset purchase agreement, dated November 2nd, 2012 was
5 hereby received into evidence as Debtor's Exhibit 6, as of this
6 date.)

7 (Amendment to the asset purchase agreement was hereby received
8 into evidence as Debtor's Exhibit 7, as of this date.)

9 (Sale order, docket 2246 was hereby received into evidence as
10 Debtor's Exhibit 8, as of this date.)

11 (Cash collateral order, docket 491 was hereby received into
12 evidence as Debtor's Exhibit 9, as of this date.)

13 MR. SKIDMORE: Thank you, Your Honor.

14 THE COURT: All right. We're done, we're adjourned.

15 MR. ECKSTEIN: Thank you, Your Honor.

16 (Whereupon these proceedings were concluded at 12:16 PM)

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2 I N D E X

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4 E X H I B I T S

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25

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2 C E R T I F I C A T I O N

3

4 I, Penina Wolicki, certify that the foregoing transcript is a
5 true and accurate record of the proceedings.

6

7 *Penina Wolicki*

8

9

10 PENINA WOLICKI

11 AAERT Certified Electronic Transcriber CET**D-569

12

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17 Date: March 22, 2013

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